IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 216

BYRON J. WALTERS,

Petitioner,

vs.

EDITH MAUD WILSON,

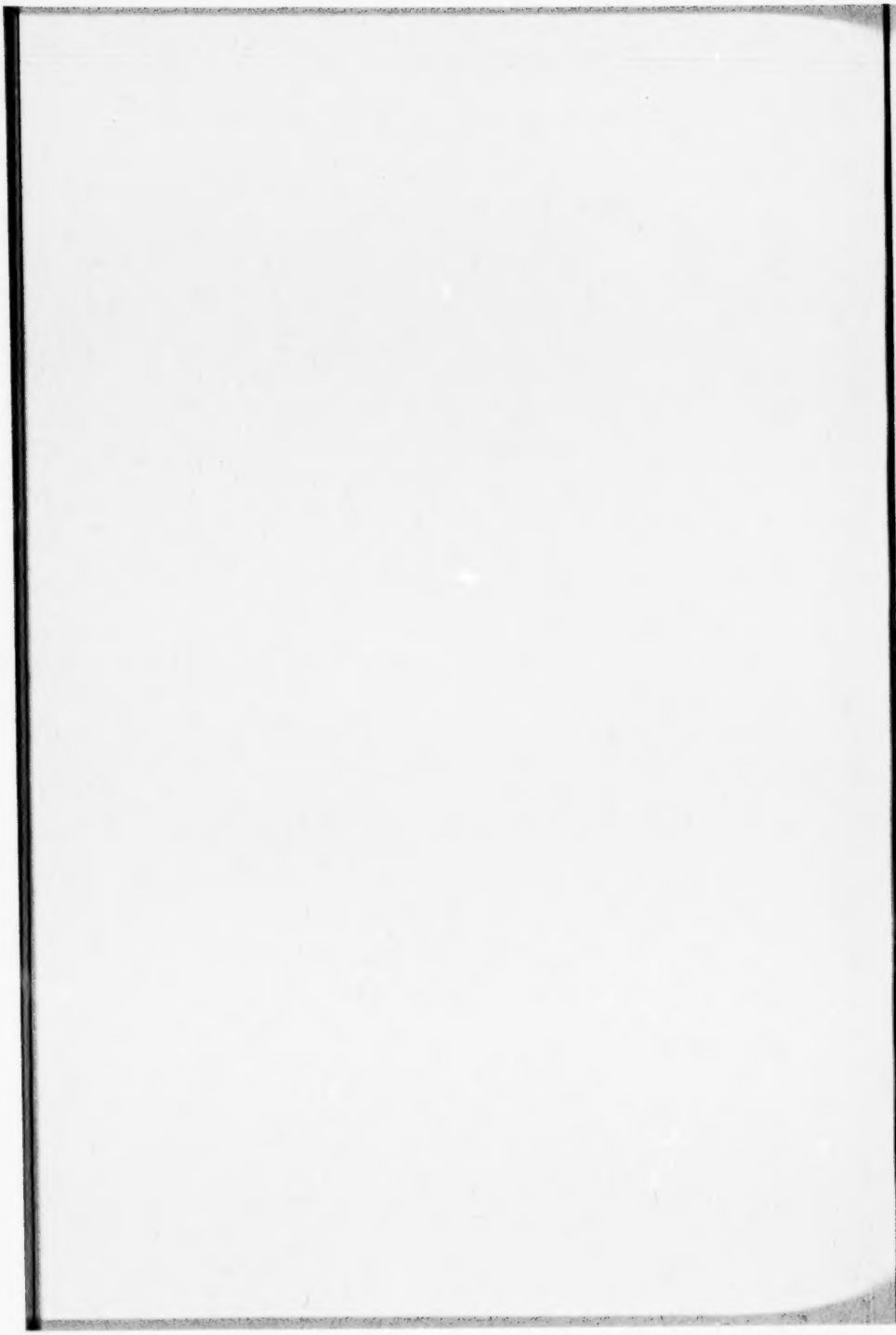
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

SAMUEL P. BLOCK,
212 Professional Building, Compton, Cal.
Counsel for Petitioner.

PIERSON & BLOCK,
Of Counsel for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.



SUBJECT INDEX.

PAGE

TABLE OF AUTHORITIES CITED.

STATUTES.

TEXTBOOKS.

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To the Honorable Harlan P. Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

May it please the Court:

The petition of Byron J. Walters respectfully shows:

I.

Jurisdiction.

Jurisdiction herein is based upon Judicial Code Section 240-a, as amended.

Reference is made to rule No. 38-5 (b) of the Supreme Court wherein is specified some of the reasons which will be considered by this Court in the exercise of its sound judicial discretion with respect to the issuance of the writ of certiorari.

II.

Summary Statement of the Case.

For the purpose of clarity, petitioner herein will sometimes be referred to as bankrupt, and respondent as creditor.

Bankrupt herein was duly adjudicated bankrupt on the 9th day of June, 1939; he was finally discharged by order of the District Court below from all his debts and obligations which were dischargeable on the 10th day of August, 1939 [R. 2-5].

In said proceedings, had in pursuance of said adjudication in bankruptcy, the claim of respondent herein was duly scheduled and due notice given [R. 4].

No claim was filed by respondent in said bankruptcy proceedings and no objection to petitioner's discharge was filed by respondent or any other person [R. 4-5].

Thereafter, in the month of May, 1940, creditor herein commenced proceedings under Section 710, Code of Civil Procedure of the State of California, whereby creditor sought to levy upon the salary of bankrupt as judge of the Municipal Court of the City of Los Angeles [R. 5], asserting that certain sums were due to creditor from bankrupt by virtue of that certain judgment of the Superior Court of the State of California, in and for the County of Los Angeles, rendered August 20, 1937, in case No. 418755 entitled Edith Maud Wilson v. Byron J. Walters and William B. Johnston. That said judgment was assertedly based, in turn, upon a former judgment of the same court in case No. 328599, entitled Edith Maud Wilson v. Byron J. Walters *et al.*, which said judgment was entered in or about the month of August, 1932.

Thereafter bankrupt duly filed in said Superior Court his motion to release the moneys held by virtue of the proceedings under Section 710, Code of Civil Procedure, upon the following grounds [R. 6]:

1. That the salary of bankrupt as a judge of the said Municipal Court was exempt from levy under Section 710, Code of Civil Procedure, because bankrupt was the holder of a constitutional office of the State of California.

2. That the judgment in said proceedings asserted, and the debt represented thereby, had been discharged in bankruptcy by virtue of the final discharge of bankrupt issued by the District Court on August 10, 1939.

That thereafter said Court granted said motion upon the ground that the office of bankrupt as judge of said Municipal Court was a municipal affair and not subject to legislative control [R. 93], and therefore his salary was not subject to levy under Section 710, Code of Civil Procedure. Whereupon creditor appealed and thereafter the District Court of Appeal of the State of California, in and for the Second Appellate District, affirmed the order of the Superior Court upon the ground that bankrupt herein was a constitutional officer of the State of California, and that his salary as such constitutional officer was not subject to levy under Section 710, Code of Civil Procedure [R. 6-93-94] and found it unnecessary to pass upon the Fraud or bankruptcy questions.

Whereupon creditor petitioned for, and was granted, a hearing in the Supreme Court of California, after judgment of the District Court of Appeal. That thereafter the Supreme Court of California reversed the order of the Superior Court, and the decision of the District Court of Appeal, and remanded the cause to the Superior Court

for further proceedings, upon the following grounds [R. 6-94]:

1. That the salary of bankrupt was subject to levy under Section 710, Code of Civil Procedure, and in so holding said Supreme Court reversed the case of *Gamble v. Utley,* 86 Cal. App. 414 (1914), which had long been the rule of decision in California (the doctrine announced in said case with relation to the attachment of salaries of public officers being in agreement with the accepted theory of the overwhelming weight of authority throughout the United States), and

2. That said judgment had not been discharged by the final discharge of bankrupt because it was founded upon a liability for money obtained by false and fraudulent representations [R. 19-24]; and in so holding the California Supreme Court disapproved the case of *Marr v. Superior Court,* 30 Cal. App. (2d) 275, 86 Pac. (2d) 141, relied upon by petitioner, which had long been the rule of decision in California (which said case followed *Crawford v. Burke,* 195 U. S. 176) [R. 22].

That said case is now pending in said Superior Court.

Whereupon bankrupt brought the instant proceeding before the United States District Court, seeking the protection of the forum which had granted his discharge in bankruptcy, and invoking the exercise of the equitable powers of said Court to protect the sanctity of its own decrees, in the exercise of its jurisdiction essentially federal and exclusive in character [R. 3].

Upon the filing of the petition for injunction therein, an order to show cause was issued by the District Court and made returnable before a referee in bankruptcy

thereof [R. 10]. The issues were presented by the verified petition [R. 3] and affidavits [R. 18; 51], without oral testimony and upon the records, files and papers therein [R. 95].

Thereupon the referee wrote an opinion [R. 61-79] and entered findings of facts, conclusions of law [R. 79-91] and an order denying to bankrupt any relief whatsoever [R. 111-115].

The referee in his opinion [R. 61-79] views the questions presented as follows (1) does the bankruptcy court have any jurisdiction at all to entertain the petition upon which the order to show cause was issued? and, (2) if the bankruptcy court does have jurisdiction, to what extent should it be exercised? [R. 66]. He holds that the Court has unlimited jurisdiction to do what it believes should be done and that in doing so, *it is not bound by the decision of the Supreme Court of the State of California* (Emphasis ours) [R. 69]. In considering to what extent the jurisdiction should be exercised, he states [R. 69]:

> "Accordingly, *I find myself unable to agree with the proposition that the previous decision of a State Court on the dischargeability of a given debt is res judicata* and that it prevents the Bankruptcy Court from passing on the question, as has been held in Prebyl v. Prudential Ins. Co., 1938, C. C. A. 8, 98 Fed. (2) 199; 37 A. B. R. (N. S.) 324; in In re Marshall, 1938, D. C. S. D. N. Y. 24 Fed. Supp. 1012; 39 A. B. R. (N. S.) 89; *and in the very recent case of Hobbs v. Franklin,* October 31, 1942, C. C. A. 5, 131 F. (2) 432 Commerce Clearing House, Paragraph 54,043, Page 55,037.
>
> "I am entirely satisfied that in this case the Bankruptcy Court has *unlimited jurisdiction* to do that

which it believes should be done and that in doing so it is *not bound* by the decision of the Supreme Court of the State of California in the matter. The fact that the bankrupt did not apply for a rehearing in that Court is, in my opinion, of no consequence and does not affect the situation in any way whatsoever.

"Since we have determined that the Bankruptcy Court has jurisdiction to entertain the bankrupt's petition which is before us for consideration, our next problem is to determine to what extent that jurisdiction should be exercised. The much discussed Supreme Court case of Local Loan Co. v. Hunt, 1934, 292 U. S. 234; 54 S. Ct. 695; 78 L. Ed. 1230; 24 A. B. R. (N. S.) 668, lays down the rule that the Bankruptcy Court should exercise its jurisdiction in cases involving the dischargeability of debts in a bankruptcy proceeding only where unusual circumstances exist.

"I believe that under this rule the Bankruptcy Court should exercise its jurisdiction in these instances:

"1. Where it appears that the bankrupt's circumstances are such that he will be unable to defend himself against a threatened action in the State Court, or, if such action is already being prosecuted against him, that he will be unable to proceed with it.

"2. Where it appears that an erroneous decision has been made in a subordinate State Court and that it may not be possible to correct the same on appeal, even though the bankrupt's circumstances are such that he is able to proceed with the matter in the State Court.

"3. Where in an action which has been decided by the highest Court of a State it appears that, for

any reason, the bankrupt has not had a fair opportunity to present his case.

"4. Where in an action which has been decided by the highest Court of a State it appears that the decision of that Court is clearly wrong.

"Obviously, if the decision of the highest Court of the State is clearly right, there is no need for the Bankruptcy Court to intervene. Likewise, if the questions presented to the highest Court of the State for decision are debatable, that is, if they are questions upon which reasonable minds may differ, the Bankruptcy Court should not take over, if the bankrupt has had a fair opportunity to present his case in the State Court. It is only where it appears that the decision in the highest Court of the State is clearly wrong that the Bankruptcy Court should assume jurisdiction . . ." (Emphasis ours.)

He then holds that the decision of the California Supreme Court is not clearly wrong but debatable; that the District Court should therefore not assume jurisdiction and that the bankrupt's petition should be denied [R. 76].

After so holding that the Court *should not assume* jurisdiction, the referee made findings of fact Numbers IV, V, VI and VII [R. 89], in which he affirmatively finds that the judgments of creditor against bankrupt are liabilities for obtaining money by false representations, and that the said debts and judgments thereby created are not dischargeable in bankruptcy. He likewise makes conclusions of law Numbers I and II [R. 90] to the effect that the judgments are not dischargeable in bankruptcy, and No. IV [R. 90] that the Court has jurisdiction to hear and determine the petition of bankrupt, but *under the circumstances of the case should not exercise said juris-*

diction, and on that ground the petition for injunction should be denied.

Bankrupt filed a petition for review from the order based on said findings and conclusions [R. 92-99] and after hearing, the Court upon its own motion entered an order vacating the submission and set the case for reargument [R. 101-103] in words as follows:

"ORDER VACATING SUBMISSION AND SETTING CAUSE FOR REARGUMENT.

A study of the record on review suggests the following considerations:

"The second cause of action which charged misrepresentation in obtaining the loan advances was, like the other three, directed at both defendants. Judgment was prayed for jointly against both defendants for the principal sum of $6430.00, although the amount was split up in several sums for the computation of interest. The damage alleged to flow from the misrepresentations in the second cause of action was the sum of $6430.00, being the total sum alleged to have been advanced in the other counts of the Complaint.

"We thus have through the Complaint a prayer for a judgment *in solido* against both defendants. In the Stipulation for judgment, which was carried into the judgment, there was a segregation of liabilities and judgment was stipulated to be rendered and then rendered jointly against Walters and Johnston in the sum of $5700.00, with interest at seven per cent from September 28, 1929, and then against Johnston individually for the balance of $730.00, divided into three sums for the purpose of computing interest. It is the law of the United States and the law of California that the liability of joint tort feasors can-

not be segregated and that only one judgment can be entered. [Washington Gas & Light Co. v. Landsden, 1898, 172 U. S. 534, 552-53; Reynolds v. New York Trust Co., 2 Cir., 1911, 188 Fed. 611; Miller v. Union Pacific Ry. 1933, 290 U. S. 227; Bee v. Cooper, 1932, 217 C. 96; Curtis v. San Pedro Transportation Co., 1935, 10 C. A. (2) 547; Phipps v. Superior Court, 1939, 32 C. A. (2) 371.]

"As the second cause of action alleged misrepresentations by both defendants and sought judgment against both for the total debt of $6430.00, does not the fact that the stipulation for judgment and the judgment divided the liability by awarding judgment against both defendants jointly for $5700.00 and against the defendant Johnston alone for $730.00, indicate that the judgment stipulated to was one for money loaned and advanced on a contractual basis, rather than a judgment awarding damages for a tort?

"In view of the fact that damages in tort cannot be apportioned as between joint tort feasors according to their degree of participation, does not the fact that, despite the charge against both, the judgment proceeds to make such apportionment indicate that it was not a judgment on a cause of action for tort? As this phase does not seem to have been considered in the proceedings, and is not touched by the Supreme Court of California in its decision in Wilson v. Walters, 1941, 19 C(2) 111, the order submitting the petition for review, heretofore entered on March 22, 1943, is hereby vacated, and the cause is set down for further argument on April 19, 1943, at ten o'clock A.M.,—the argument to be confined to the questions here raised.

Dated this 31st day of March, 1943.

LEON R. YANKWICH, Judge."

After argument based on such order for reargument, the Court entered its minute order on review [R. 104] in words following:

"MINUTE ORDER ON REVIEW.

The bankrupt's petition for review of the order of the Referee, dated January 6, 1943, in which he denied the petition of the said bankrupt for an order restraining one Edith Maud Wilson, a creditor of said bankrupt, from prosecuting a certain judgment against him, heretofore argued and submitted, is now decided as follows:

"The order of the Referee in so far as it denies the injunction sought by the bankrupt is affirmed. The said order, in all other respects, and the findings of fact are reversed.

"On further consideration of the matter and of the questions propounded in the memorandum of March 31, 1943, I am of the view that the Referee was right in declining to take jurisdiction. While on a question of substantive law, we might substitute our judgment for that of a state court, the determination that the judgment here involved was one in tort turns upon question of California pleading. And the decision of the Supreme Court of California on the subject (Wilson v. Walters, 1941, 19 C(2) 111) should be accepted as binding on the bankruptcy court.

"None of the unusual circumstances warranting assumption of jurisdiction, which the Supreme Court envisaged in Local Loan Co. v. Hunt, 1934, 292 U. S. 234, 241, exists. (*And see: Hobbs v.*

Franklin Jewelry Co., Inc., 1942, 5 Cir., 131 F(2) 432.)

"The Referee's findings of fact are vacated and set aside and the bankrupt's petition is ordered dismissed solely upon the ground that no unusual circumstances exist for assuming jurisdiction after final determination of the state court.

Dated this 3rd day of May, 1943" [R. 104]. (Emphasis ours.)

Thereafter, petitioner filed his motion for a new trial and rehearing [R. 107-109] which was on May 24, 1943, by said District Court denied [R. 110].

Whereupon the bankrupt appealed from said minute order of the District Court to the Honorable United States Circuit Court of Appeals for the Ninth Circuit [R. 114 *et seq.*]. A copy of the opinion of the Circuit Court of Appeals is included in the record [R. 133-135]; also reported in 142 F. (2d) 59. In this opinion the Circuit Court stated in part:

"Thus appellant sought to relitigate in the Bankruptcy Court an issue which he had previously litigated in the Courts of California, and which had there been determined against him. This he could not do. (Citing cases.)

"The Referee's order was correct. The Bankruptcy Court's judgment, which affirmed the order in part and reversed it in part, is so modified so as to affirm it *in toto*.

"As thus modified, the judgment is affirmed."

III.

Summary Statement of the Facts.

On September 28, 1929 (just before the financial crash occurring later in the autumn of 1929) your petitioner, together with William B. Johnston, borrowed six thousand dollars ($6,000.00) from respondent executing their promissory note therefor [R. 37]. As security for the payment of said note petitioner executed and delivered to respondent certain assignments of attorney's fees [R. 39, 40], and also petitioner and said Johnston as of even date executed another document [R. 56].

Thereafter, in or about the month of September, 1931 (before petitioner was appointed a Judge of the Municipal Court of the City of Los Angeles, on August 2, 1937, by the Governor of the State of California [R. 7]) respondent filed a complaint against petitioner and said William B. Johnston [R. 28-44].

Said complaint was in four counts and was entitled "Complaint for Damages and for Breach of Contract."

The first cause of action may be described as one on an express promise to repay money loaned.

The second cause of action contains certain allegations concerning false representations.

The third cause of action is an action upon a promissory note.

The fourth cause of action is upon money loaned.

It is clearly apparent that three of the four causes of action stated in the complaint are actions *ex contractu*. The relief prayed is for judgment as upon the causes of action *ex contractu*, including the *specific amounts* set forth in the *contracts* pleaded.

It should be noted that the prayer requests attorney's fees, which are stipulated in the contracts pleaded, and further requests interest at 8 per cent, as stipulated in the contracts pleaded, and does not request interest at the legal rate, which in California is 7 per cent.

It should be further noted that no other recovery is requested in the way of damages, or otherwise, than the *normal recovery under the contracts.*

On October 31, 1931, petitioner filed an answer to said State Court action No. 328599 [R. 53-59] in which he admits the execution of the promissory note alleged in counts II and III of said complaint and denies each and every allegation of fraud contained in count II of said complaint and sets up the defense of usury. That said action was never tried before any Court [R. 45]. Thereafter on August 12, 1932, petitioner signed a stipulation for judgment [R. 44-45]. Thereafter on August 17, 1932, judgment was entered by said Court on said stipulation in language following [R. 46-47]:

> "The plaintiff having filed her complaint herein praying for judgment against defendants upon certain allegations as stated in the complaint, and the defendant Byron J. Walters having answered said complaint personally without counsel, and the defendant William B. Johnston having filed no answer nor made any appearance herein, and the said cause having been set for trial before a jury and the defendant having signed and filed a stipulation for judgment herein waiving trial, findings of fact and conclusions of law, and the said defendants having stipulated that judgment may be taken and entered herein in accordance with the allegations of the complaint in certain amounts as hereinafter set forth.

"Now therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff do have and recover from the defendant Byron J. Walters and William B. Johnston the sum of Fifty-seven Hundred Dollars ($5700.00) with interest at seven per cent per annum from Sept. 28, 1929; and that the plaintiff do have and recover from defendant William B. Johnston the sum of Six Hundred Dollars ($600) with interest at seven per cent per annum from December 27, 1929, and the further sum of One Hundred Dollars ($100) with interest at seven percent per annum from June 27, 1930, and the sum of Thirty Dollars ($30) with interest at seven per cent per annum from July 18, 1930.

It Is Further Ordered, Adjudged and Decreed that all parties pay their own court costs herein.

Dated at Los Angeles, California, this 17 day of August, 1932.

HENRY M. WILLIS
Judge of the Superior Court."

Thereafter, in July, 1937, respondent filed her complaint in said State Court to renew said judgment [R. 47]. On August 20, 1937, default judgment against petitioner and said Johnston was entered [R. 50].

Thereafter on June 9, 1939, petitioner herein was duly adjudicated bankrupt and finally discharged by order of the District Court below from all his debts and obligations which were dischargeable on the 10th of August, 1939 [R. 2-5]. In said proceedings the claim of respondent herein was duly scheduled and due notice given [R. 4].

No claim was filed by respondent in said bankruptcy proceedings and no objection to petitioner's discharge was filed by respondent or any other person [R. 4-5].

Thereafter, such proceedings were had and taken as are set forth chronologically in this petition for a writ of certiorari under the heading numbered II entitled "Summary Statement of the Case".

The evidence at the first hearing before the Referee in the United States District Court below is all contained [R. 15] in the petition filed herein in the District Court and upon which the instant proceeding is based [R. 3-9] and upon the verified answer (although entitled affidavit) of respondent Wilson in opposition to the said petition [R. 18-51]; and upon the affidavit of petitioner herein in answer to said affidavit of respondent [R. 51-59].

No other evidence was taken before the District Court upon the petition for review.

IV.

The Questions Presented.

The questions presented are:

1. Does the United States District Court have jurisdiction to consider bankrupt's ancillary petition in equity therein presented?

   (a) If so, is it an unlimited jurisdiction, or is it a limited jurisdiction—that is—must unusual circumstances exist before the District Court is permitted to take jurisdiction?

   (b) If unusual circumstances must exist—what are they? How may they be defined or recognized or "envisaged" and do they exist in this case?

   (c) Are the United States Courts bound by the decisions of the highest Court of a State on the question whether or not the judgments against

bankrupt are debts excepted from the operation of the final discharge of bankrupt within the meaning of Section 17(a) 2 of the Bankruptcy Act (11 U. S. C. A. Sec. 35)?

(1) Are the United States Courts bound to accept State Court decisions as the rule of decision applicable?

(2) Is the California Supreme Court decision (*Wilson v. Walters,* 19 Cal. (2d) 111, 119 Pac. (2d) 340) *res adjudicata* in the instant proceeding?

2. Is the debt represented by the judgment of creditor against bankrupt in the State Court a liability for obtaining money or property by false pretenses or false representations, within the meaning of Section 17(a)2 of the Bankruptcy Act (11 U. S. C. A. Sec. 35) or is it a liability *ex contractu* and therefore discharged by the final discharge in bankruptcy of petitioner?

V.

Reasons Relied on for the Allowance of the Writ.

Petitioner respectfully assigns the following reasons for the allowance of the writ of certiorari:

1. The Circuit Court of Appeals for the Ninth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court in failing to give effect, on the question of jurisdiction, to the decision of this Court in *Local Loan Co. v. Hunt,* 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230, and in *Crescent Livestock v. Butchers Union,* 120 U. S. 141.

2. The decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with the decisions of other Circuit Courts of Appeals, notably in *re Skorcz* (Seventh Circuit), 67 Fed. (2d) 187; *Davison Paxon Co. v. Caldwell* (Fifth Circuit—1940), 115 Fed. (2d) 189; *Reynolds v. New York Trust Co.* (First Circuit), 188 Fed. 611, on the question of jurisdiction. (Other cases treated in Brief.)

3. The Circuit Court of Appeals for the Ninth Circuit has failed to follow applicable decisions theretofore rendered by it on the question of jurisdiction, notably *Sims v. Jamison* (1933) (C. C. A. Ninth Circuit), 67 Fed. (2d) 409; *Holmes v. Rowe* (1938) (C. C. A. Ninth Circuit), 97 Fed. (2d) 537; *Lowe v. California State Federation of Labor*, (C. C. A., Ninth Circuit) 189 Fed. 714; *San Francisco Shopping News Co. v. City of South San Francisco* (C. C. A. Ninth Circuit 1934), 69 Fed. (2d) 879.

4. The conflict created by the decisions of the Courts of the several Circuits on the vital questions here involved has arisen since this Court spoke in *Local Loan Co. v. Hunt;* and has arisen chiefly from a differing concept of the meaning of certain language in the *Local Loan* case. It therefore becomes important that this Court speak again to decide issues,

   (a) very important to a large number of people who appear as creditors and debtors in bankruptcy proceedings in the Federal Courts throughout the nation;

(b) and to decide a real and embarrassing conflict of opinion between the Circuit Courts of Appeal which creates a real injustice ~~to petitioner,~~ and has deprived him of substantial rights under the Bankruptcy Statutes. (*Layne v. Bowler Corp. v. Western Well Works,* 261 U. S. 387, 392.)

5. The Referee below, the District Court and the Circuit Court of Appeals have failed to take jurisdiction and decide the case on its merits, according to applicable decisions of this Court.

6. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the lower Court, as to call for an exercise of this Court's powers of supervision, in that the Circuit Court sustained the Referee in his order declining to take jurisdiction while at the same time reinstating the Referee's incomplete findings of fact and conclusions of law on the merits (which findings had been reversed by the District Judge on petition for review); said Circuit Court at the same time declining to rule on the merits, and review said findings.

7. The California Supreme Court decision (*Wilson v. Walters,* 19 Cal. (2d) 111), is not in accord with applicable decisions of this Court and it expressly repudiates several decisions of this Court, chief among which are *Crawford v. Burke,* 195 U. S. 176, 49 L. Ed. 147; *Tindle v. Birkett,* 205 U. S. 183, 51 L. Ed. 762; and is not in accord with the applicable law in California and the United States.

With due respect for the Courts below, we venture to suggest that the position in which petitioner now finds himself by virtue of their decisions is, to say the least, *utterly confusing* and when viewed in the aggregate verges closely upon the ridiculous. To correct the *obvious errors* and *confusion of thought* on the *important questions involved* in this proceeding we respectfully urge that this Honorable Court should grant the writ of certiorari.

The Referee ruled that the District Court has unlimited jurisdiction [R. 69] in language following:

> "Accordingly, I find myself unable to agree with the proposition that the previous decision of a State Court on the dischargeability of a given debt is *res judicata* and that it prevents the Bankruptcy Court from passing on the question, as has been held in Prebyl v. Prudential Ins. Co., 1938, C. C. A. 8, 98 Fed. (2) 199; 37 A. B. R. (N. S.) 324; in In re Marshall, 1938, D. C. S. D. N. Y. 24 Fed. Supp. 1012; 39 A. B. R. (N. S.) 89; *and in the very recent case of Hobbs v. Franklin*, October 31, 1942, C. C. A. 5, 131 F. (2) 432 Commerce Clearing House, Paragraph 54,043, Page 55,037.
>
> "I am entirely satisfied that in this case the *Bankruptcy Court has unlimited jurisdiction* to do that which it believes should be done and that in doing so it is *not bound by the decision of the Supreme Court of the State of California in the matter.*"

But, he says further [R. 69-70] that the case of *Local Loan Co. v. Hunt*, 292 U. S. 234 "lays down the rule that the Bankruptcy Court should exercise its jurisdiction . . . only where unusual circumstances exist." The Referee then sets forth four instances in which he

believes the Bankruptcy Court should exercise its jurisdiction [R. 70] and concludes that:

> "Obviously, if the decision of the highest Court of the State is clearly right, there is no need for the Bankruptcy Court to intervene. Likewise, if the questions presented to the highest Court of the State for decision are debatable, that is, if they are questions upon which reasonable minds may differ, the Bankruptcy Court should not take over, if the bankrupt has had a fair opportunity to present his case in the State Court. It is only where it appears that the decision in the highest Court of the State is clearly wrong that the Bankruptcy Court should assume jurisdiction."

After holding that the decision of the California Supreme Court (*Wilson v. Walters,* 19 Cal. (2d) 111, 119 Pac. (2d) 340) is not clearly wrong but that the questions therein cited are *debatable* the Referee ruled that the United States District Court should therefore not assume jurisdiction. Nevertheless he proceeded to make findings of fact and conclusions of law [R. 80-91] concluding as a matter of law "that this Court has jurisdiction to hear and determine the petition in this matter, but that, *under the circumstances in the case,* this Court should not exercise its said jurisdiction, and that, *upon that ground,* the petition of the bankrupt should be denied . . ." [R. 90]. (Emphasis ours.)

Upon petition for review the District Judge strongly indicated agreement with petitioner's position that the original judgment in the California Superior Court stipulated to by petitioner was one for money loaned on a contractual basis, rather than a judgment awarding damages for a tort (see: order vacating submission and setting

cause for reargument [R. 101-103].) The District Judge also stated that the points raised by him *had not been touched by the Supreme Court of California* in its decision in *Wilson v. Walters*, 19 Cal. (2d) 111 [R. 103]. He thereafter entered his minute order on review stating his view that the Referee was right in declining to take jurisdiction, and that

> "While on a *question of substantive law*, we might substitute our judgment for that of a State Court, the determination that the judgment here involved was one in tort turns upon the *question of California pleading*. And the decision of the Supreme Court of California on the subject (Wilson v. Walters, 1941, 19 C.(2) 111) *should be accepted as binding* on the Bankruptcy Court.
>
> "None of the *unusual circumstances* warranting assumption of jurisdiction, which the Supreme Court envisaged in Local Loan Co. v. Hunt, 1934, 292 U. S. 234, 241, exists (and see: Hobbs v. Franklin Jewelry Co. Inc., 1942, 5 Cir., 131 F. (2) 432).
>
> "The Referee's findings of fact are vacated and set aside and the bankrupt's petition is ordered dismissed *solely upon the ground that no unusual circumstances exist for assuming jurisdiction* after final determination of the State Court." [R. 104-105.] (Emphasis ours.)

On appeal the Circuit Court of Appeals in its opinion [R. 133-135] took the instant case out of the operation of the rule announced in *Local Loan v. Hunt*, 292 U. S. 234, by stating "appellant did not at that time petition the Bankruptcy Court to enjoin the enforcement of appellee's judgment." Then citing in the footnote No. 1:

> "*Cf.* Local Loan Co. v. Hunt, 292 U. S. 234."

There is nothing in the opinion of *Local Loan Co. v. Hunt, supra,* to warrant such distinction; and in the case of *Davison, Paxon Co. v. Caldwell* (Fifth Circuit—1940), 115 Fed. (2d) 189, the rule in *Local Loan Co. v. Hunt* was followed *after the petitioner had appeared in the State Court* and *failed in an effort to litigate* the question of fraud involved in that case. Other cases will be noted in our brief.

The Circuit Court in the instant case then says further:

> "thus appellant sought to relitigate in the Bankruptcy Court an issue which he had previously litigated in the Courts of California, and which had there been determined against him. This he could not do. (Citing cases.)
>
> "The Referee's order was correct. The Bankruptcy Court's judgment, which affirmed the order in part and reversed it in part, is modified so as to affirm it ***in toto.***
>
> "As thus modified, the judgment is affirmed."

As authority for the statement that appellant could not "relitigate in the Bankruptcy Court an issue which he had previously litigated in the Courts of California," the opinion cites *Hobbs v. Franklin Jewelry Co.* (Fifth Circuit), 131 Fed. (2d) 432.

Thus it is seen that the Referee in Bankruptcy found himself unable to agree with the case of *Hobbs v. Franklin Jewelry Co.* and *repudiated* the doctrine of said case [R. 69]; the District Judge in his minute order on review *cited with approval* said case of *Hobbs v. Franklin Jewelry Co.* [R. 105] and now we find that the Circuit Court of Appeals in partly reversing the District Judge and affirming the Referee *in toto* cites with approval the same

case of *Hobbs v. Franklin Jewelry Co.* as authority for its order of affirmance [R. 135], while the Referee in the *very proceedings which were affirmed repudiated and refused to follow the same case.*

And as further authority on the same point in note 5 of the opinion the Circuit Court cites six cases heretofore decided by this Honorable Supreme Court of the United States. Suffice it to say that we earnestly urge with due respect to the Honorable Circuit Court of Appeals for the Ninth Circuit that not one of the cited cases is determinative of the issue in the instant case and none is in point herein and none is controlling.

In the cited case of: *Mitchell v. First National Bank*, 180 U. S. 471, *no question of Federal Law was involved*, it was a *diversity case* and the question was as to liability on a guaranty. The statement of the Court therein that a question presented in State Courts is *res adjudicata* whether depending on Federal, general or local law is *purely dictum*, as no *Federal question was involved.*

The cited case of *Lion Bonding and Surety Co. v. Karatz*, 262 U. S. 77 was a *diversity case* involving the appointment of receivers.

The cited case of *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470, was a suit in equity to restrain the Public Utilities Commission of the State of Ohio from enforcing an order concerning the operation of motor buses. We quote from the decision at page 473:

> "The parties were all citizens of Ohio, and the *sole ground advanced for invoking the jurisdiction of the Federal Court was* that the suit was one arising under the constitution of the United States and *involving more than Three Thousand Dollars.*"

The cited case of *Baldwin v. Iowa State Traveling Mens Assn.*, 283 U. S. 522, involved the doctrine of *res adjudicata as it applied between the United States District Court for Western Missouri* and the *United States District Court for Southern Iowa*, and concerned mainly the due process clause guaranteed by the fourteenth amendment.

In the cited case of *American Surety Co. v. Baldwin*, 287 U. S. 156, the validity of an *Idaho State Court* judgment and of a decree of the *Circuit Court of the Ninth Circuit* was challenged under a claim that the judgment was void under the *due process clause* of the Fourteenth Amendment.

The cited case of *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, involved a proceeding under the *interpleader act*, the occasion for which action was the existence of *inconsistent judgments* as to the ownership of certain stock.

None of the above cases relied on by the Circuit Court involved any question under the *Bankruptcy Statutes*, nor did any of these cases present, as here, an *ancillary and dependent bill in equity.*

They do not control because of the language of this Honorable Court in its latest expression on the subject in *Local Loan Co. v. Hunt, supra.* We quote in part as follows:

> *"It is important to bear in mind that the present case is one not within the jurisdiction of a State Court, but is a dependent suit brought to vindicate the decrees of a Federal Court of Bankruptcy entered in the exercise of a jurisdiction essentially Federal and exclusive in character. And it is that situation to which we address ourselves and to which our decision is confined."*

We respectfully suggest that the action of the lower Federal Courts since this Court expressed itself in *Local Loan Co. v. Hunt, supra*, is one of the most compelling reasons for the granting of certiorari in the case at bar.

May we invite attention to the situation in the Fifth Circuit. The case of *In re Skorcz*, 67 Fed. (2d) 187, decided by the Circuit Court of Appeals for the Seventh Circuit was the decision which the same Court followed in deciding *Local Loan Co. v. Hunt* in memorandum fashion (67 Fed. (2d) 998), which found approval by the Supreme Court of the United States (292 U. S. 241).

Then in 1940 the Circuit Court of Appeals for the 5th Circuit, in *Davison, Paxon Co. v. Caldwell*, 115 Fed. (2d) 189, followed explicitly the doctrine announced by this Honorable Court in *Local Loan Co. v. Hunt, supra*, in a state of facts strikingly similar to the case at bar.

Then in 1942 the same Circuit Court of Appeals for the 5th Circuit, decided the case of *Hobbs v. Franklin Jewelry Co.*, 131 Fed. (2d) 432 (relied on by the District Judge and the Circuit Court of Appeals in the instant case), wherein the Court absolutely *ignores* the doctrine which that Court itself had embraced two years before in the case of *Davison, Paxon Co. v. Caldwell, supra*, and absolutely ignored the case of *Local Loan Co. v. Hunt, supra*, decided by this Court. Inasmuch as the *Skorcz* case and the *Caldwell* case and the case of *Local Loan Co. v. Hunt, supra*, have never been overruled we respectfully suggest that the case of *Hobbs v. Franklin Jewelry Co.* which seems to have controlled the decision herein of the Circuit Court for the Ninth Circuit *does not correctly state the law* and *is not precedent herein.*

A similar situation exists in the *Ninth Circuit* where pends the case at bar. In 1933 the Circuit Court for the Ninth Circuit decided the case of

Sims v. Jamison, 67 Fed. (2d) 409,

in which it affirmed the issuance of an injunction similar to that prayed for in the instant petition in the District Court upon the authority of *Seaboard Small Loan Corporation v. Ottinger* (4th Cir.) (50 Fed. (2d) 856); and then in 1938, in the case of

Holmes v. Rowe, 97 Fed. (2d) 537,

the Circuit Court of Appeals for the *Ninth Circuit* affirmed the granting of a permanent injunction similar to that sought in the instant proceeding *after the petitioner therein had litigated the validity of the judgment in the State Court* (p. 538). In this case the Court again followed the *Ottinger* case, *supra*, and its own case of *Sims v. Jamison* (9 Cir.) *supra*, and the case decided by this Honorable Court,

Local Loan Co. v. Hunt, supra;

and then in April of 1944 we find the opinion in the instant case [R. 133] entirely ignoring *Sims v. Jamison* and *Holmes v. Rowe, supra*, and failing to follow *Local Loan Co. v. Hunt.*

If it may be urged, as is indicated in the Circuit Court opinion herein, that there is a distinction between the instant case and those of the Ninth Circuit heretofore cited on the point that in the instant case *previous litigation* had been had in the State Court before the petition was filed in the Federal Court, may we respectfully suggest that the point is *not determinative* because in the case of *Holmes v. Rowe, supra*, the petitioner had *twice met defeat* in the *State Courts on motions made by him.*

Another anomalous situation exists in the *Fourth Circuit*. Early the Circuit Court of Appeals for the *Fourth Circuit* decided the case of *Seaboard Small Loans Inc. v. Ottinger,* 50 Fed. (2d) 856, which became one of the leading cases guiding subsequent decisions of Federal Courts in determining that a bankruptcy trial court has jurisdiction to decide whether or not the discharge relieves the bankrupt of his debt. It was cited with approval by the *Ninth Circuit Court of Appeals* in *Sims v. Jamison, supra*, and again by the *Ninth Circuit Court* in *Holmes v. Rowe, supra*, wherein at page 540 the *Ottinger* case was quoted at length. It has received wide support and was approved by this Court in the case of *Local Loan v. Hunt*. And yet in 1942 we find the same *Fourth Circuit* Court of Appeals in the case of *Helms v. Holmes*, 129 Fed. (2d) 263 (by a divided Court), while recognizing that it had theretofore applied the principles announced in *Seaboard Small Loan Corporation v. Ottinger* and while being aware of the rule announced in *Local Loan Co. v. Hunt*, declining to follow the principles announced in these cases because the bankrupt in the case before it had *failed to seek redress in the State Court*. And in so doing they cited with approval the case of *In re Weisberg* (D. C.), 253 Fed. 833, which case had been by this Court expressly overruled in *Local Loan Co. v. Hunt, supra* (please see the vigorous and able dissenting opinion of Judge Paul in this case).

We thus have a very peculiar situation confronting us in the case at bar. The Ninth Circuit Court of Appeals says to petitioner in the instant proceeding that the Federal Court has *no jurisdiction to grant* the relief prayed *because the petitioner litigated in the State Courts*, while the *Fourth Circuit Court of Appeals* in *Helm v. Holmes,*

supra, ruled that the same relief could not be accorded by the Federal Court because the petitioner therein *had not sought relief in the State Courts.*

We also have a situation arising by virtue of this Court's decision in *Local Loan Co. v. Hunt, supra,* which we think compels the attention of this Honorable Court and which should be reached by a *writ of certiorari* herein. Both the Referee below and the District Judge, on review, have *seized upon* a statement in *Local Loan Co. v. Hunt, supra,* to justify their refusal to assume jurisdiction in the case at bar. It follows:

> "It does not follow, however, that the Court was bound to exercise its authority. And it probably would not and should not have done so except under *unusual circumstances such as here exist.*" (Emphasis ours.)

In the interests of brevity at this point we shall reserve argument for our accompanying brief on this question, but we desire to point out that because of the varied and inconsistent approaches by the lower Federal Courts to the doctrine announced in *Local Loan Co. v. Hunt, supra,* the statement last above quoted could be clarified by this Court with propriety. With due respect to this Honorable Court we make bold to suggest that in the circumstances and in view of the context the quoted passage verges closely on *dictum,* especially as it deals in probabilities. The statement seems not to be necessary to the decision and not decisive of any issue raised. But, be that as it may, we cannot conclude that this Honorable Court by the use of these words meant to retract and vitiate its unequivocal declaration of jurisdiction immediately preceding the statement (p. 241 of 292 U. S.).

Petitioner also finds himself in a situation from which he can only be extricated by a review in this Court. No Federal Court has yet ruled on the merits of his petition herein and the sole question really involved in the case, to-wit:

What Is the Nature of the State Court Judgment?

True, the Referee made findings of fact and conclusions of law but the District Judge ruled that they were improper and reversed them. The Circuit Court of Appeals reinstated the findings but did not pass upon the merits of the case holding that the case could not be "relitigated" in the Federal Court. But the findings have been reinstated by decree of the Circuit Court while at the same time said Court refused to review them. There are thus in existence findings of fact and conclusions of law which may become *res adjudicata* as to this petitioner, while at the same time he has been denied a review of them by the Circuit Court of Appeals, which appeal on the merits is a matter of right sustained by Judicial Code section 128, as amended (28 U. S. C. A., Sec. 225).

Brief in Support of This Petition.

Annexed to this petition, and as a part of same is a brief in support thereof.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and send to this Honorable Court for its review and determination, on a day to be named therein,

a full and complete transcript of the record and all proceedings in the case numbered 10502 in that Court, entitled "Byron J. Walters, Appellant, vs. Edith Maud Wilson, Appellee," and that its judgment therein made on April 8, 1944 may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and equitable.

Dated at Los Angeles, California, this 30th day of June, 1944.

BYRON J. WALTERS,
Petitioner,

By SAMUEL P. BLOCK,
His Counsel.

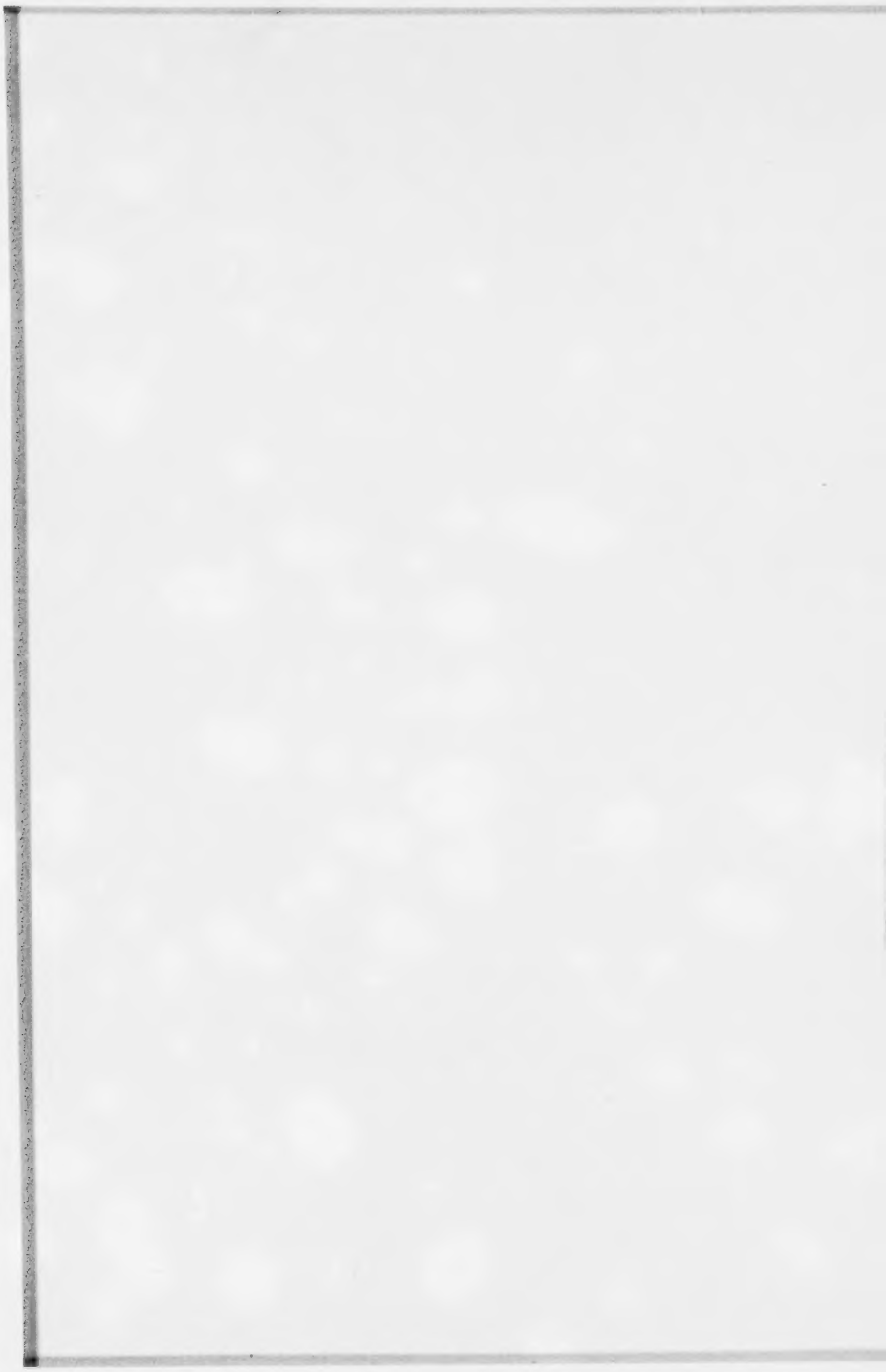
PIERSON & BLOCK,
Of Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that the said petition is not interposed for delay.

Dated this 30th day of June, 1944.

SAMUEL P. BLOCK,
Counsel for Petitioner.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

BYRON J. WALTERS,

Petitioner,

vs.

EDITH MAUD WILSON,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 142 Fed. (2d) 59, and is in the record at page 133.

The minute order on review of the District Judge is in the record [R. 105], as is the opinion of the Referee [R. 61], the findings of fact and conclusions of law of the Referee [R. 79], and the order of the Referee [R. 111].

II.

Statement of the Case and the Facts.

The essential facts of the case are set forth in the accompanying petition for a writ of certiorari.

III.

Specifications of Error Relied On.

1. The Circuit Court of Appeals for the Ninth Circuit committed error in filing its judgment or decree herein on April 8, 1944, modifying and affirming the judgment or decree of the Court below. The ruling of the Circuit Court is error and against the law applicable to the facts of the case in the following respects:

(a) The Court erred in ruling that the petition therein is an effort to relitigate in the Bankruptcy Court an issue which he had previously litigated in the courts of California.

(b) The Circuit Court erred in determining that petitioner could not present the issues contained in his petition herein in the Bankruptcy Court after certain phases thereof had been litigated in the State courts.

(c) The Court erred in affirming the judgment of the District Court in its declination to assume jurisdiction.

(d) The Circuit Court erred in reinstating the findings and order of the Referee in Bankruptcy which had been reversed by the District Judge.

(1) If the District Court does not assume jurisdiction it cannot make findings upon the merits.

(2) If it does assume jurisdiction and makes findings then the Circuit Court of Appeals should pass upon all of the merits of the case as reflected in the findings and should determine:

a. Are the findings of fact supported by the evidence?

b. Do the conclusions of law correctly state the law of the case as applied to the facts.

(e) The Circuit Court should have passed upon the merits of this case and ruled as a matter of law that the judgment against bankrupt in the Superior Court of California was a judgment *ex contractu* and not a judgment on a liability for obtaining money or property by false pretenses or false representations within the meaning of Section 17(a) 2 (11 U. S. C. A. Sec. 35); and that it was therefore discharged by petitioner's final discharge in bankruptcy; and should thereupon have made and entered its judgment and decree reversing the order of the District Court and directing said District Court to issue the permanent injunction prayed by petitioner.

IV.

Summary of Argument.

1. The Circuit Court of Appeals erred in failing to rule that the District Court has jurisdiction to consider bankrupt's supplemental, ancillary and dependent petition in equity.

A. Such jurisdiction is inherent and plenary and is not wholly dependent upon the existence of "unusual circumstances."

B. If unusual circumstances must exist—they exist in this case.

C. The decision of the California Supreme Court in *Wilson v. Walters* (19 Cal. (2d) 111) has no binding effect on the Bankruptcy Court in its con-

sideration of the petition for injunction filed therein, because

(1) The courts of the United States are not bound by the decisions of a State court on the question whether or not judgments against bankrupt are debts excepted from the operation of the final discharge of bankrupt, within the meaning of Section 17a (2) Bankruptcy Act (11 U. S. C. A. 1135), jurisdiction to determine such question being *essentially federal and exclusive in character.*

(2) And the Bankruptcy Court herein is not bound by the doctrine of *res adjudicata* arising from decisions of the State court in litigation between creditor and bankrupt.

(a) The State Supreme Court's decision is *not res adjudicata* in the federal proceedings as to the effect of the discharge in bankruptcy because a State court has no jurisdiction to decide the issues as presented by petitioner's ancillary bill in equity herein.

(b) The State Supreme Court's decision is *not res adjudicata* because it is *not a final judgment.*

(c) The State Supreme Court's decision is *not res adjudicata* as to the effect of the discharge in bankruptcy because the decision on such point was *dictum.*

2. The Circuit Court erred in failing to reverse the District Court for failure to make any findings of fact upon which to base its order, which were mandatory under Rule 52(a), Federal Rules of Civil Procedure.

3. The debt represented by the judgment of creditor against bankrupt is not a liability for obtaining property by false pretenses or false representations, within the meaning of Section 17(a)2 of the Bankruptcy Act (11 U. S. C. A., Sec. 35), *but is a liability ex contractu.*

A. The judgment of creditor against bankrupt [R. 46] in apportioning damages between the two co-defendants is indisputably a judgment on contract.

B. A further analysis of the complaint [R. 28-43] on which the State court judgment is based clearly shows that the action is contractual in nature; and by the overwhelming weight of authority the complaint and resulting judgment sound in contract.

C. The complaint in the State court action sounding in contract, creditor, by bringing her action in such form, *waived the alleged fraud* and sued in contract.

(1) This is true under existing California law which the Supreme Court of California failed to follow (*Wilson v. Walters*, 19 Cal. (2d) 111).

(2) And the *doctrine* of the *waiver of fraud* has been *accepted and followed in bankruptcy cases* (beginning with *Crawford v. Burke*, 195 U. S. 176, which case was expressly repudiated by the California Supreme Court (*Wilson v. Walters*, 19 Cal. (2d) 111) and by overruling *Marr v. Superior Court*, 30 Cal. App. (2d) 275, 86 Pac. 141).

D. The *burden of proof in this case is upon the creditor* to establish that the judgment is *excepted* from the operation of bankrupt's discharge and *this burden has not been sustained.*

ARGUMENT.

I.

The Circuit Court of Appeals erred in failing to rule that the District Court Has Jurisdiction to Consider Bankrupt's Supplemental, Ancillary and Dependent Petition in Equity.

A. Such Jurisdiction Is Inherent and Plenary and Is Not Wholly Dependent Upon the Existence of "Unusual Circumstances."

The Circuit Court of Appeals said (142 Fed. (2d) 59—this record page 135):

> "Thus appellant sought to relitigate in the Bankruptcy Court an issue which he had previously litigated in the Courts of California and which had there been determined against him. This he could not do."

The Court cites as authority for this statement the case of:

Hobbs v. Franklin Jewelry Co.,

which we have heretofore shown in our petition for certiorari not to be the law. We have also shown that the other cases cited in footnote 5 of the opinion are not applicable.

Arrayed against this view of the Circuit Court is the *overwhelming weight of authority* found in the decision of this Honorable Court in the case of:

Local Loan Co. v. Hunt, 292 U. S. 234,

and in other decisions to which we will hereafter refer.

In the case of *Local Loan Co. v. Hunt, supra, this Court* says at page 239:

> *"First.* The pleading by which respondent invoked the jurisdiction of the Bankruptcy Court in the present case is in substance and effect a *supplemental and ancillary bill in equity,* in aid of and *to effectuate the adjudication and order made by the same court.* That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is *well settled.* Root v. Woolworth, 150 U. S. 401, 410-412; Julian v. Central Trust Co., 193 U. S. 93, 112-114; Riverdale Mills v. Manufacturing Co., 198 U. S. 188, 194 *et seq.; Freeman v. Howe,* 24 How. 450, 460. And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding *being ancillary and dependent,* the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of S. 265 of the Judicial Code (R. S., S. 720), U. S. C., Title 28, S. 379. Julian v. Central Trust Co., *supra,* 112; Dietzch v. Huidekoper, 103 U. S. 494, 497; Root v. Woolworth, *supra,* 413; M'Donald v. Seligman, 81 Fed. 753; St. Louis, I. M. & S. Ry. Co. v. Bellamy, 211 Fed. 172, 175-177; Brun v. Mann, 151 Fed 145, 150.
>
> *"These principles apply to proceedings in bankruptcy. In re* Swofford Bros. Dry Goods Co., 180 Fed. 549, 554; Sims v. Jamison, 67 F. (2d) 409, 410; Pell v. M'Cabe, 256 Fed. 512, 515-516; Seaboard Small Loan Corp. v. Ottinger, 50 F. (2d) 856, 859.

> "Petitioner relies upon a number of decisions where other Federal Courts sitting in bankruptcy have declined to entertain suits similar in character to the present one, on the ground that effect of a discharge in bankruptcy is a matter to be determined by any Court in which the discharge may be pleaded. See, for example, Hellman v. Goldenstone, 161 Fed. 913; *In re* Marshall Paper Co., 102 Fed. 872, 874; *In re* Weisberg, 253 Fed. 833, 835 *In re* Havens, 272 Fed. 975. To the extent that these cases *conflict with the view just expressed* they are *clearly not in harmony* with the *general rule in equity* announced by this Court." (Emphasis ours.)

Every statement in the above quotation applies to the case at bar. The proceeding initiated by the bankrupt in this case is identical to the one initiated by the bankrupt in the quoted case—and the relief sought is the same.

Thereafter, in the same case on page 241 of 292 U. S., the Supreme Court says:

> *"What has now been said establishes the authority of the bankruptcy court to entertain the present proceeding, determine the effect of the adjudication and order and enjoin petitioner from its threatened interference therewith."*

The above statement is *clear and unequivocal.* There can be no doubt as to its purpose and meaning. It establishes with finality the jurisdiction of the Court. This jurisdiction either exists or it does not exist. Jurisdiction, as such, cannot depend upon "unusual circumstances," for jurisdiction is power to act.

There is a statement immediately following the one last quoted from *Local Loan Co. v. Hunt, supra,* which has

been seized upon by the District Court to justify its refusal to assume jurisdiction in this case. It follows:

> "It does not follow, however, that the court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist."

On the basis of the above quotation, the District Court ruled that the Referee was right in declining to take jurisdiction, and that the Court itself should not assume jurisdiction because it felt that no "unusual circumstances" exist in this case, such as the Supreme Court "envisaged." And it did all this *without even making any findings as to the existence of a single circumstance as a fact, usual or unusual,* which did or did not appear in the proofs of the case.

And if it be construed that the Referee's findings of fact are by the decision of the Circuit Court now reinstated we maintain that such findings are not now controlling because petitioner herein has been *denied a review* of them. And even if they are now controlling there is nothing in the findings to warrant either the Referee or the District Court in holding that jurisdiction should not be taken by the District Court.

By the use of the words "it does not follow, however, that the Court was bound to exercise its authority," this Honorable Supreme Court could not possibly mean to retract and vitiate its unequivocal declaration of jurisdiction immediately preceding. To so hold would do violence to the plain intent and meaning of the words and to every rule of construction. It did nothing more than to express the ancient rule that a court of equity is not bound to grant the relief within its powers unless the

circumstances warrant, or sufficient equity is shown. In adding the thought that the Court "would not and should not have done so, except under unusual circumstances, such as here exist" this Court, we respectfully assume, was simply stating that in its opinion, sufficient equities existed for the granting of its equitable relief. This Court did not say, nor could it have meant, that relief would be granted only in cases where the facts were identical to those under consideration; this would be absurd, as it is well known that courts of equity act in a multiplicity of circumstances. And by the use of the word "bound to exercise its authority" the plain context makes it apparent that this Court meant "bound to grant the injunction." It is elementary that a Court can either grant or deny relief; but it is equally certain that its jurisdiction to hear and determine the matter is not thereby effected—for it must assume jurisdiction before it can determine whether to grant or withhold relief—that is, it must determine by findings of fact the circumstances upon which it is petitioned to act.

The above argument is borne out by an examination of the portion of the opinion of *Local Loan Co. v. Hunt, supra,* immediately following the last quoted portions, 292 U. S. 241. This Court on this entire page is doing nothing more nor less than setting forth the equities which exist in favor of the bankrupt—the inadequacy of appeal to the law side as against the equity side; the settled but unfavorable views of the State court; the alternative of long and expensive State court litigation "before reaching a Court whose judgment upon the merits of the question had not been predetermined." What are these, if they are not statements of the equities giving rise to the reason for the granting of the injunctive relief

prayed? We have no quarrel with the District Court if it chooses to call them "unusual circumstances" but we do say that they are not the bases for the assumption of jurisdiction, for *that* the Court already possessed; but they were only the bases by which the Court was guided in deciding to grant its injunctive relief. And if it was necessary for these equities or circumstances to be "envisaged," the trier of the facts must assume jurisdiction before they, or any other equities or circumstances, can be brought to pass before his judicial vision.

This Court further says at page 244 of 292 U. S.:

> *"It is important to bear in mind that the present case is one not within the jurisdiction of a state court, but is a dependent suit brought to vindicate decrees of a federal court of bankruptcy entered in the exercise of a jurisdiction essentially federal and exclusive in character. And it is that situation to which we address ourselves, and to which our decision is confined."* (Emphasis ours.)

The instant case is likewise a dependent suit, brought to vindicate a decree of the federal court; the same kind of a decree which was sought to be vindicated in the cited case, to-wit: a final discharge in bankruptcy; and for any federal court to deny its own jurisdiction, in this respect, is to strip such Court of duties and powers which this Court has said not only that it enjoys, but which are *essentially and exclusively federal.*

We have heretofore suggested that in the circumstances and in view of the context the quoted passage concerning "unusual circumstances" is *dictum* because it deals in probabilities, seems not to be necessary to the decision and is not decisive of any issue raised.

And the conclusion is inescapable that doubt is cast upon the true significance of this statement concerning unusual circumstances in *Local Loan Co. v. Hunt, supra,* because this Court in the *Local Loan* case, in holding that the facts showed a proper case for the exercise of equitable jurisdiction referred to *Seaboard Small Loan Corporation v. Ottinger,* 50 Fed. (2d) 859 with approval. Upon referring to the *Ottinger* decision we find that it rejects the theory that the existence of a remedy in the State Court prevents a Court of Bankruptcy from assuming jurisdiction to enjoin harassment of the bankrupt after his discharge, for the Court was apparently of the opinion that in *every case* where a bankrupt was a wage earner he had a right to resort to the Federal Court to secure the fruits of his discharge; (and we do not suppose that this principle is changed because the wages are earned through mental rather than through physical exertions).

The Court in that case says:

> "In view of this *purpose of the act* and of the expressed provision that the bankrupt shall be *released from all provable debts,* it would be indeed a strange situation if the Court vested with jurisdiction to enforce the act were without power to stay the hand of a creditor whose debt has been discharged by bankruptcy, but who nevertheless *persists in harassing* the bankrupt with efforts to collect it."

And the *Ninth Circuit Court of Appeals* in the case of *Holmes v. Rowe* (1938; C. C. A. 9th), 97 Fed. (2d) 537, while discussing and even quoting extensively from the *Local Loan Co.* case on closely related questions, did not discuss the necessity that *"unusual circumstances"* be present to justify the issuance by a Court of Bankruptcy

of an injunction against the pursuit of State Court proceedings.

In that case the District Court granted bankrupt's petition for a permanent injunction restraining the creditor from levying execution on a judgment against the bankrupt and the appeal was from such order. The creditor had caused a judgment to be entered against the bankrupt who *petitioned the State Court* to restrain the creditor from levying execution but *his petition was denied;* he applied a *second time* to the State Court for relief by way of an order that the judgment be cancelled and discharged of record which *was also denied. Having twice suffered defeat* in the State Court the bankrupt then filed in the United States District Court which had granted his discharge in bankruptcy a petition essentially the same as that filed by the petitioner herein in the District Court below. Upon the appeal from the order of the District Court the main contention of the creditor was that the Court did not have jurisdiction because the bankrupt *had not exhausted* his remedies in the State Court so as to enable him to come into the Federal Court. The Court said:

> "With this contention of appellant we do not agree. A review of the decisions discloses that a Federal District Court, once having obtained jurisdiction of a controversy, and having rendered a decision in the matter, has complete power to *protect the judgment or decree which it has rendered,* and may go so far as to enjoin an action entertained in the state court by a litigant, involving the same subject-matter, when such action may in any way interfere with, or nullify the effect of said judicial determination. So here the Court having discharged the appellee in bankruptcy, still retained sufficient jurisdiction to grant

an injunction restraining appellant from levying execution upon a judgment rendered in his favor by the state court against the appellee upon a claim adjudicated in the bankruptcy court."

Further the Court said:

"Referring to these statutes, the Supreme Court has repeatedly said that, "'the power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is * * * *inherent in a court of bankruptcy,* as it is in a *duly established court of equity.'*" Steelman v. All Continent Corp., 301 U. S. 287, 289, 57 S. Ct. 705, 710, 81 L. Ed. 1085. See, also, Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & P. Ry Co., 294 U. S. 648, 675, 55 S. Ct. 595, 605, 79 L. Ed. 1110.

"That the District Court not only had the power to issue the writ, but committed no error in issuing it in this particular case, is amply borne out by the case of *Local Loan Co. v. Hunt.*"

Further the Court said:

"Nor do we consider that the failure of the appellee to exhaust his remedies in the state court would preclude the District Court from exercising its jurisdiction in the matter. This was also determined in the case of *Local Loan Co. v. Hunt, supra,* which cited, among others, the case of *Seaboard Small Loan Corporation v. Ottinger,* 4 Cir., 50 F. 2d 856, 77 A. L. R. 956." (Emphasis ours.)

Upon a comparison of the above cited case and the instant decision of the Circuit Court for the same Ninth Circuit it will readily be seen that your petitioner has been placed in a *paradoxical and ridiculous position.* In the *Holmes v. Rowe* case the Court held that the failure of the Bankrupt to exhaust his remedies in the State

Court did not preclude him from seeking the protection of the United States Court. *Implicit in this holding* is the *proposition that the exhaustion of his remedy in the State Court would certainly not have affected the case.* In the instant case the Circuit Court tells this petitioner that because he has exhausted his remedies in the State Courts or as it is put "previously litigated in the Courts of California" when he came to the Federal Court he was not entitled to its protection, saying:

> *"Thus appellant sought to relitigate in the Bankruptcy Court an issue which he had previously litigated in the Courts of California, and which had there been determined against him. This he could not do."*

The Circuit Court in the *instant case* apparently overlooked, forgot or ignored the fact that in the *Holmes v. Rowe* case decided by it only six years ago, the bankrupt who was afforded relief and protected therein by said Court, also

> *"sought to relitigate in the Bankruptcy Court an issue which he has previously litigated in the Courts of California, and which had there been determined against him,"*

and that this same Circuit Court in its affirmance in *Holmes v. Rowe* in effect said: *"This he could do."*

It is no answer to say that in the *Holmes v. Rowe* case the bankrupt quit "trying his luck" in the State Courts *after two defeats* and did not pursue an appeal in the State Courts, as did the bankrupt here. The decision and judgment of the trial court, not appealed, was as final and as binding as the judgment of the Supreme Court in the instant case below (without

conceding that the California decision is final). The issue had been determined against Rowe with the same degree of finality in the State Court as the issue had been determined against the bankrupt in the instant case in the State Court. Rowe sought to and did litigate, in the Federal Courts with their approval, and effectively, the same issue which he had previously litigated in the State Courts and *which had there been determined against him. We ask no more than the same privilege granted by the Court below to Rowe and denied to this petitioner.*

In the *Holmes v. Rowe* case the petitioner made *two motions* in the State Court *calculated to stop execution* on the judgment against him there, which *motions were denied.* In the case at bar this is all that petitioner did. He made a *simple motion* in the Superior Court *that execution under the applicable statute be suspended. Every other proceeding in the State Court thereafter was on the motion and initiative of creditor.*

The motion was granted on one ground, affirmed by the California District Court of Appeals, reversed by the California Supreme Court on two grounds and remanded to the Superior Court for further proceedings where it is now pending. The creditor took all of the appeals.

We invite attention to the case of *In re Skorcz,* 67 Fed. (2d) 187. This case, decided by the Circuit Court of Appeals of the Seventh Circuit, was the decision which the same court followed in deciding *Local Loan Co. v. Hunt* in memorandum fashion (67 Fed. (2d) 998) which found approval by this Court. The Court said, at page 190:

> "It may be conceded, as contended by appellant, that the wages included in the restraining order con-

stituted no part of the bankrupt's estate at the time of the adjudication. That estate, and none other the court was bound to administer; but it does not follow from this admission that the bankruptcy court is not interested in the protection of the bankrupt's subsequent estate. Indeed, quite the converse is true, and constitutes the primary purpose of the bankruptcy enactment. *That the bankruptcy court has plenary power to award that protection by injunction we think there can be no doubt, otherwise the effect of the Bankruptcy Act oftentimes might be destroyed.* 11 U. S. C. A., S. 11, subd. 15; Seaboard Small Loan Corp. v. Ottinger, *supra; In re Fellows* (D. C.), 43 F. (2d) 122; *In re* Voorhees, *supra; In re* Swofford Bros. (D. C.), 180 F. 549; *In re* Home Discount Co., *supra.*" (Emphasis ours.)

Another case, very similar to the case at bar, both from a factual standpoint and on principle, is:

> *Davison-Paxon Co. v. Caldwell*, 115 Fed. (2d) 189, decided by the Circuit Court of Appeals for the 5th Circuit in 1940.

We state the issues before the Circuit Court briefly:

This appeal was by a creditor from a judgment of the District Court of the United States for the Northern District of Georgia in favor of the bankrupt in an ancillary proceeding to enjoin the enforcement against the bankrupt by garnishment of a judgment entered against him in a Georgia state court. As in the present case the suit was brought in the bankruptcy court on the ground that the debt had been discharged in bankruptcy and "because of the settled but erroneous state of the decisions in Georgia, plaintiff had been compelled to invoke the jurisdiction of the bankruptcy court." The defendant contested the suit

on the ground: (1) that the matter was one for decision in the state courts and not for the invocation of the bankruptcy jurisdiction; (2) *that the judgment it had obtained was a conclusive adjudication that the debt was not discharged in bankruptcy. The district judge maintained his jurisdiction on the basis of Local Loan Co. v. Hunt, and determined the effect of the state court judgment on the pleadings in that court and held that the debt was dischargeable and had been discharged and granted the relief prayed.* The appeal followed. The facts of the case are:

In 1939 appellant sued appellee in the Municipal Court for $444.00 for merchandise purchased. A few days thereafter appellee filed her voluntary petition in bankruptcy scheduling defendant as one of her creditors and was duly adjudged bankrupt. A short time thereafter appellant filed an amended complaint alleging in effect that at the time of the purchase the defendant was insolvent and had no present intention to pay for the goods and concealed her insolvency and lack of intention to pay; that appellant relied on the defendant's promise to pay and was damaged; that the action of defendant in purchasing the merchandise without a present intention to pay and knowing her promise to pay for the same *was false, deceitful and fraudulent.*

Thereafter in the state court, *the appellee defendant filed a plea for a stay of proceedings,* setting out that the debt upon which the suit was predicated was dischargeable in bankruptcy. *The state court rendered judgment nevertheless in favor of the plaintiff.* Thereafter the appellee filed in the bankruptcy court an application for injunction reciting the above facts and that the plaintiff had sued out

a garnishment to collect on the judgment debt which appellee claimed had been discharged in bankruptcy. The Circuit Court said:

> "It was not denied below, it is not denied here, *that the decisions of Georgia are to the effect that a debt contracted as, according to the amended petition, this debt was, is, within the exception of Sec. 17, sub. a (2), of the Bankruptcy Act, 'a liability for obtaining money or property by false representations.'* What was in question below, what is in question here, is whether a debt created as this one was, according to the allegations of the amended petition, is such a liability.
>
> "The District Judge thought it was not. We agree. *But for the Georgia decisions holding that the purchase of goods with no present intention to pay results in a debt which is a liability for obtaining money or property by false pretenses and false representations, we should regard the question as admitting of only one answer. . . .*"

The Circuit Court then proceeds to affirm the decision of the District Court granting the relief prayed by the bankrupt.

In the case of *Gleason v. Thaw,* 185 Fed. 345, the Circuit Court of the United States directly held that under the amendment of 1903 there is a direct duty imposed upon the court of bankruptcy to determine the nature of the debt, and whether or not it comes within the exception to the operation of the discharge in bankruptcy. We quote from the opinion:

> "By the act of 1898, as it originally stood, judgments in actions for frauds were made such exceptions, and as such would be binding upon a court of bankruptcy. The amendment of 1903 changed this

language to 'liabilities for obtaining property under false pretenses or false representations,' so that debts which are such liabilities are now excluded from the provable debts of which the bankrupt may be discharged. *While enlarging somewhat the scope of such exceptions, this amendment imposed upon the court of bankruptcy the duty of determining whether the debt sought to be excepted was or was not such a liability.*" (Emphasis ours.)

In the light of the foregoing cases, the District Court should have assumed and exercised full jurisdiction to determine the nature of the state court's judgment, in order to protect, or at the very least, to determine and declare the rights of the bankrupt in his discharge; in so doing that court exercises a jurisdiction essentially federal and exclusive in character, and that court should have, in the further exercise of its broad equitable powers, granted the injunctive relief as prayed.

B. If Unusual Circumstances Must Exist, They Exist in This Case.

Bankrupt's petition to the District Court [R. 3] contained the following allegations upon which the Referee *failed to make any findings of fact:*

In paragraph II thereof [R. 4]:

". . . that although duly notified of the proceedings in bankruptcy and having timely knowledge thereof, said Edith Maud Wilson failed to file a claim in said bankruptcy proceedings."

In paragraph III [R. 5]:

"That the said Edith Maud Wilson despite such notice and knowledge did nothing with respect to the said liability nor did she at the subsequent hearing on your petitioner's discharge object to the same as

she had ample right and power to do under Section 14 of the Bankruptcy Act."

And in paragraph VI [R. 7]:

"Your petitioner alleges that the said Edith Maud Wilson threatens to, and unless restrained therefrom will proceed with the enforcement of the said judgment of the Superior Court against your petitioner and that if she is allowed to proceed with the enforcement of said judgment, such procedure would nullify the decree of this Honorable Court granting to your petitioner a final discharge from all of his debts and would circumvent the objects and purposes of the Bankruptcy Act."

And in paragraph VII [R. 7-8]:

"That your petitioner is a Judge of the Municipal Court of the City of Los Angeles having assumed that office on August 2, 1937, by appointment of the Governor of the State of California. That all of the salary of petitioner is necessary for the support of his dependents and himself, he being married and having five dependents besides his wife, three of whom are minor children of school age, his oldest daughter being in her sophomore year in college, and his son being in the last elementary grade in a military academy. That continuous and unrelenting pursuit for the satisfaction of said judgment by said Edith Maud Wilson has caused and will continue to cause much damage to your petitioner because of the character of his position and the nature of his public duties. That the work of your petitioner is such that the harassment and annoyance of private litigation is disturbing to his work and the usual attendant publicity accompanying the exercise of the asserted rights of said Edith Maud Wilson to enforce execution of the judgment continues to damage

> your petitioner irreparably, particularly in view of the fact that your petitioner is by law an elective officer and subject to the will of the people at stated elections within the City of Los Angeles, and further in view of the fact that said Edith Maud Wilson continues to assert that said judgment is based in fraud and is not dischargeable in bankruptcy."

And although the District Judge reversed all findings and made none of his own and found that [R. 105]: "none of the unusual circumstances warranting assumption of jurisdiction which the Supreme Court envisaged in *Local Loan Co. v. Hunt,* 1934, 292 U. S. 234, 241, exists. (and see: Hobbs v. Franklin Jewelry Co. Inc., 1942, 5 Cir., 131 F. (2d) 432)", although having no factual basis upon which to base this conclusion of law.

And while the Circuit Court of Appeals evidently reinstated the findings of fact of the Referee, it is none the less true that the Referee's findings of fact were *silent* as to *findings on the circumstances alleged in the petition* as just hereinabove quoted.

Yet the only alternative we now have is to argue the point of unusual circumstances even though we think that findings of fact thereon should be made before any Court should dismiss bankrupt's petition as all of the lower Courts did (and even though we do not concede that unusual circumstances must exist to warrant jurisdiction).

Are the circumstances of this case so different from those in Local Loan Co., supra, that the lower Courts could properly hold that as a matter of law they do not warrant the assumption of jurisdiction?

We most emphatically urge that they are not.

In the *Local Loan* case (p. 241), it was open to the respondent to submit to the Municipal Court the question

as to the effect of the bankruptcy decrees, and that court was authorized in law to afford relief, the equivalent of that sought by the respondent in the federal court. The same holds true in the instant case, as the Superior Court could have granted equivalent relief. In the cited case, the legal remedy would be inadequate to meet the requirements of justice, because the highest court of Illinois had already resolved against bankrupt the sole question at issue. The same is true in the instant case [R. 65]. In the cited case, the alternative of invoking the equitable jurisdiction of the Bankruptcy Court was long and expensive litigation in the state courts, before reaching a court "whose judgment upon the merits of the question had not been predetermined." Such court could only be the federal court, as we have just seen that the matter had been determined by the highest court of Illinois. In the instant case the only alternative to invoking the jurisdiction of the federal court will be a continuous series of garnishments against bankrupt's salary—involving a multiplicity of hearings to determine exemptions, actions to renew the judgment and successive appeals based upon the rulings on such matters in the state courts. In the cited case, the remedy was inadequate because (p. 242) of the wholly disproportionate trouble, embarrassment, expense, and possible loss of employment which it involved.

In the instant case the bankrupt's petition to the Bankruptcy Court alleges: continuous and unrelenting pursuit for the satisfaction of said judgment by creditor [R. 7], *causing much damage to petitioner because he is a Judge of the Municipal Court of the City of Los Angeles, and particularly because he is an elective officer and subject to the will of the people at stated elections and because*

creditor continues to assert that said judgment is based in fraud [R. 8]; *that the work of petitioner is such that the harassment and annoyance of private litigation is disturbing to his work; and the usual attendant publicity accompanying the asserted rights of creditor to enforce execution of the judgment continues to damage petitioner irreparably* [R. 8]; *successive proceedings in the State courts, and trouble and embarrassment caused petitioner in the support of six dependents* [R. 7].

Furthermore the decision of the State Supreme Court in *Wilson v. Walters,* 19 Cal. (2d) 111—although purporting to determine certain issues, actually is not yet final because the court remanded the cause to the trial court for further proceedings.

We earnestly submit that the most important circumstance leading to the affirmance of injunctive relief in the *Local Loan* case, was the *settled but erroneous state* of the decisions of the Illinois Supreme Court, which were destructive of the purpose and spirit of the Bankruptcy Act (p. 245). In the instant case, the bankrupt has urged and still urges, the erroneous state of the decisions of the Supreme Court of California on a matter involving the interpretation of a federal statute, to-wit: the Bankruptcy Act—and particularly involving the types of judgments excepted from discharge under section 17(a)2 of said Act, but the District Judge after unmistakably indicating his agreement, in principle, with bankrupt's contentions as to the nature of the state court judgment [R. 101-102] thereafter, and without having himself refuted the law or logic advanced by him, and without being advised to the contrary by any cited decision, withdrew (as did the Referee) into a self-imposed "shell" of lack of jurisdiction, totally ignoring the fact that the very state

of the decisions of the California Supreme Court afforded the "unusual circumstance" which it thought so necessary to an assumption of jurisdiction. We challenge anyone to analyze the decision of *Local Loan Co. v. Hunt, supra,* and to reach any conclusion except that the vital circmstance justifying equitable relief was the *settled adverse and erroneous state of decision of the Illinois courts; and yet in the instant case the District Judge has refused even to determine such issue, either for or against bankrupt, contenting himself with the observation that* [R. 104-105] "* * * the decision of the Supreme Court of California on the subject (*Wilson v. Walters,* 1941, 19 Cal. (2d) 111), should be accepted as binding on the bankruptcy court," and terminates his refusal to assume jurisdiction by the proviso, "after final determination of the state court," without expressing agreement with such decision as a matter of law. The Circuit Court of Appeals, in effect, fell into the same error [R. 135].

But wherein are the circumstances warranting the intervention of the powers of the Federal Court in the case at bar essentially different from the circumstances in the cases of:

Holmes v. Rowe, supra (9 Cir.);

Davison, Paxon Co. v. Caldwell, supra;

In re Skorcz, supra;

Sims v. Jamison, supra (9 Cir.) (Cited in *Local Loan Co. v. Hunt*);

Seaboard Small Loan v. Ottinger, supra (Cited in *Local Loan Co. v. Hunt*);

In re Swofford Bros. Dry Goods Co., 180 Fed. 549 (cited in *Local Loan Co. v. Hunt*);

Pell v. McCabe, 256 Fed. 512 (cited in *Local Loan Co. v. Hunt*).

C. The Decision of the California Supreme Court in Wilson v. Walters Has No Binding Effect on the Bankruptcy Court in its Consideration of the Petition for Injunction Filed Therein, Because

(1) THE COURTS OF THE UNITED STATES ARE NOT BOUND BY THE DECISIONS OF A STATE COURT ON THE QUESTION WHETHER OR NOT JUDGMENTS AGAINST A BANKRUPT ARE DEBTS EXCEPTED FROM THE OPERATION OF THE FINAL DISCHARGE OF BANKRUPT, WITHIN THE MEANING OF SECTION 17a(2) BANKRUPTCY ACT (11 U. S. C. A. 1135), JURISDICTION TO DETERMINE SUCH QUESTION BEING ESSENTIALLY FEDERAL AND EXCLUSIVE IN CHARACTER.

We think it is indisputable in the record that the existence of the State Court decision (*Wilson v. Walters,* 19 Cal. (2d) 111), was the *primary and impelling reason* for the refusal to assume jurisdiction in this case by the Referee, the District Judge and the Circuit Court of Appeals. As a matter of fact this is the only proposition upon which they have all agreed.

But this Honorable Court, in upholding the Federal jurisdiction in *Local Loan Co. v. Hunt, supra,* was not disturbed by the existence of final state court opinions in disagreement with its own views—much more—it was at pains to declare the inefficacy and lack of binding effect and even the lack of jurisdiction of the state court (292 U. S. 234, 240):

> *"Petitioner relies upon a number of decisions where other federal courts sitting in bankruptcy have declined to entertain suits similar in character to the present one, on the ground that the effect of a discharge in bankruptcy is a matter to be determined by any court in which the discharge may be pleaded.*

> See, for example, Hellman v. Goldstone, 161 Fed. 913; *In re* Marshall Paper Co., 102 Fed. 872, 874; *In re Weisberg*, 253 Fed. 833, 835; *In re* Havens, 272 Fed. 975. *To the extent that these cases conflict with the view just expressed they are clearly not in harmony with the general rule in equity announced by this court.*"

And we feel certain that this Court will place in the same category the case of *Hobbs v. Franklin Jewelry Co. Inc.* (1942, 5 Cir.), 131 Fed. (2d) 432 (which was followed by the District Judge in his minute order on review [R. 105] and followed by the Circuit Court of Appeals [R. 135]; and that this Court will disapprove the same. Our search discloses no Federal case in which this case has been followed except the case at bar.

And again in *Local Loan v. Hunt, supra*, at pages 243-244 of 292 U. S., this Court said:

> "To the foregoing array of authority petitioner opposes the decisions of the Supreme Court in *Illinois* in Mallin v. Wenham, 209 Ill. 252; 70 N. E. 564, and Monarch Discount Co. v. C. & O. Ry. Co., 285 Ill. 233; 120 N. E. 743. Undoubtedly, these cases hold, as petitioner asserts, that in Illinois an assignment of future wages creates a lien effective from the date of the assignment which is not invalidated by the assignor's discharge in bankruptcy. The contention is that even if the general rule be otherwise, this court is bound to follow the Illinois decisions, since the question of the existence of a lien depends upon Illinois law.
>
> "We find it unnecessary to consider whether this contention would in a different case find support in S. 34 of the Judiciary Act of 1789, now S. 725, Title 28, U. S. C., since we are of opinion that

it is precluded here by the clear and unmistakable policy of the banruptcy act. *It is important to bear in mind that the present case is one not within the jurisdiction of a state court, but is a dependent suit brought to vindicate decrees of a federal court of bankruptcy entered in the exercise of a jurisdiction essentially federal and exclusive in character. And it is that situation to which we address ourselves, and to which our decision is confined."* (Emphasis ours.)

After emphasizing that the purpose of the Bankruptcy Act is to afford the debtor a new opportunity in life, at page 245 this Court said:

"The various provisions of the bankruptcy act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act. *Local rules subversive of that result cannot be accepted as controlling the action of a federal court."*

In concluding its decision the United States Supreme Court said:

" * * we reject the Illinois decisions as to the effect of an assignment of wages earned after bankruptcy as being destructive of the purpose and spirit of the bankruptcy act."*

The lower courts, in the instant case, did not attempt to determine whether or not the California decision as to the nature and legal effect of the judgment which was sought to be enforced against bankrupt's earnings after discharge, was *destructive of the purpose and spirit of the bankruptcy act,* although strongly urged so to do by the bankrupt. [R. 95-96, 108-109.] In so failing to

inquire, the District Court violated its plain duty as a federal court to determine the effect of its own decrees, to protect the sanctity of its judgments and to give a federal construction to a federal statute. Instead it abdicated its exclusive jurisdiction in favor of a state tribunal.

The Circuit Court of Appeals erred in approving such action, and in so doing failed to follow the *rule of decision in the Ninth Circuit* as definitely established and announced in:

Sims v. Jamison, supra;

Holmes v. Rowe, supra;

Lowe v. California State Federation of Labor, 189 Fed. 714;

San Francisco Shopping News Co. v. City of South San Francisco, 60 Fed. (2d) 879;

In re Pacific Alloy & Steel Co., 299 Fed. 952;

and in so doing the Circuit Court of Appeals *is in conflict with the decisions in other Circuits* following:

In re Skorcz (7 Cir.), 67 Fed. (2d) 187;

Davison, Paxon v. Caldwell (5 Cir. 1940), 115 Fed. (2d) 189;

Reynolds v. New York Trust Co. (1st Cir.), 188 Fed. 611;

John Deere Plow Co. v. McDavid (8th Cir), 137 Fed. 802;

Clark v. Rogers, 183 Fed. 518;

Harrison v. Foley, 206 Fed. 57;

In re Plotke (7 Cir.), 104 Fed. 964;

West Virginia v. Adams Express Co., 219 Fed. 794;

and in so ruling the Circuit Court of Appeals in this case has *refused to follow applicable decisions* of this Honorable Court, to-wit:

Local Loan Co. v. Hunt, supra;
Crescent Livestock v. Butchers Union, 120 U. S. 141;
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149;
Neves v. Scott, 14 L. Ed. 141;
Roberts v. Northern Pac. Ry., 158 U. S. 1;
Bucher v. Cheshire Ry. Co., 125 U. S. 555;
United States v. Reynolds, 235 U. S. 133;
Tullock v. Mulvane, 184 U. S. 197;
Factors' and Traders Ins. Co. v. Murphy, 111 U. S. 738.

(2) THE BANKRUPTCY COURT HEREIN, IS NOT BOUND BY THE DOCTRINE OF RES ADJUDICATA ARISING FROM DECISIONS OF THE STATE COURT IN LITIGATION BETWEEN CREDITOR AND BANKRUPT.

The Referee *repudiated* the *doctrine of res adjudicata* as controlling in this case [R. 69]. The District Judge held that the decision of the Supreme Court of California on the subject should be held as binding on the Bankruptcy Court because the case turned upon a question of *California pleading* [R. 104] and then dismissed the petition *solely upon the ground that no unusual circumstances exist for assuming jurisdiction . . .*" [R. 105]. The Circuit Court of Appeals said the Referee was right and *affirmed his order in toto,* saying:

> *"thus appellant sought to relitigate in the Bankruptcy Court an issue which he had previously litigated in the Courts of California and which had there been determined against him. This he could not do."*

The Circuit Court of Appeals in its *short, and to say the least, unrevealing and incomplete opinion* seems to lay its *total emphasis* upon the fact herein that petitioner *litigated in the State Court* [R. 134, 135] saying,

> *"appellant did not at that time petition the Bankruptcy Court to enjoin the enforcement of appellee's judgment.* (Note 1: Cf. Local Loan Co. v. Hunt, 292 U. S. 234.) *Instead he moved the Superior Court for an order releasing the money received from the auditor."*

From the above language we assume that the *doctrine embraced* by the Circuit Court of Appeals in the opinion is the doctrine of *res adjudicata,* although they affirmed in toto the order of the Referee which was based upon an opinion *which repudiated the doctrine of res adjudicata.* In this the Circuit Court was in error as is shown by the fact that in its own decision treated hereinbefore *Holmes v. Rowe, supra* (9 Cir. 1938), it affirmed the granting of a permanent injunction by the Bankruptcy Court after the matter had been litigated *on motion of the debtor in the State Court and had there been decided adversely to him.* In all of the other cases we have cited hereinbefore on the question of jurisdiction the question of previous litigation by the same parties in the State courts has not been considered as at all determinative because of the undisputed exclusive jurisdiction of the Bankruptcy Court.

In the case of

Davison-Paxon Co. v. Caldwell, supra,

the parties and the issues in both the state and Federal Courts were the same. The facts of the case are strikingly similar to those in the case at bar.

There the Circuit Court of Appeals upheld the District Court's ruling that it was not bound by the judgment of the State Court as to whether a judgment was discharged in bankruptcy by reason of allegedly being a liability for obtaining money or property by false pretenses or false representation; and further that it was not bound by the decision of the State Court as to whether or not the facts alleging false pretenses or false representations were or were not properly pleaded. This case is directly in point.

The obvious and only question before the lower Court in the case at bar was a construction of the nature of the State Court judgment, and the application thereto of the provisions of a Federal Statute, to-wit: Section 17, Subd a(2) of the Bankruptcy Act. Naturally in eyeing the judgment and taking its measure any Court must look to the record and to the pleadings to determine the nature of the judgment. The Supreme Court of California did not comprehensively do this. It did only two things. First it decided that one count of the complaint properly charged fraud; and, second, it interpreted the language of the judgment "in accordance with the allegations of the complaint" to mean a confession of fraud.

But even in these considerations the Supreme Court of California was not passing on a question of pleading, but was construing a judgment, and was determining whether the Federal Statute could be so interpreted as to except the judgment from the effect of a discharge in bankruptcy.

This is not a question of local concern, nor of pleading, but is essentially one of construing the effect of a Federal Statute. In such circumstances our attention has been called to no case, and counsel cites none, and the lower Courts cite none, which holds that the Federal Court is

bound by a decision of the State Court, on a question of pleadings or otherwise.

With the great weight of authority holding that the Federal Court is the final arbiter in the construction of a Federal Statute, and that such problem is essentially Federal, it seems ludicrous to contemplate that this vast power of the Federal Courts should be emasculated merely because in the exercise of this power the Federal Court encounters a decision of a State Court which attempts to construe a Federal Statute, and in so doing violates all settled principles of law—or that the Federal Court is bound by the State Court decision because it incidentally involves pleadings in connection with determining the nature of the judgment.

That such is not the true state of the law was definitely decided in the said case of:

Davison-Paxon Co. v. Caldwell (supra.)

In that case a District Court of the United States came squarely at odds with a State Court on a question of law, towit: a construction of the character of a judgment from an examination of the pleadings, and declined to follow the State Court rule. We quote from page 189 of the opinion:

> "The suit was to enjoin the enforcement by garnishment against plaintiff of a state court judgment for debt. It was brought in the bankruptcy court on the ground that the debt had been discharged in bankruptcy, and because of the *settled but erroneous state of the decisions in Georgia,* plaintiff had been compelled to invoke the jurisdiction of the bankruptcy court. The defendant contested the suit on the ground (1) *that the matter was one for decision in the state courts and not for the in-*

vocation of the bankruptcy jurisdiction; (2) *that the judgment it had obtained was a conclusive adjudication that the debt was not discharged in bankruptcy. The district judge maintaining his jurisdiction on Hunt v. Loan Company* and determining the effect of the state court judgment *on the pleadings in that court,* concluded that the debt was dischargeable and had been discharged and granted the relief prayed."

Further (page 190):

"What was in question below, what is in question here is whether a debt created as this one was, *according to the allegations of the amended petition,* is such a liability." (Emphasis ours.)

Obviously both the District Court and the Circuit Court of Appeals classified the judgment as being dischargeable in bankruptcy solely upon an examination of the pleadings which supported the State Court judgment and then clearly declined to follow the Georgia decisions. Clearly then, the *Circuit Court of Appeals for the Ninth Circuit* in the case at bar *is in conflict* with the *Circuit Court of Appeals for the Fifth Circuit* in the *Davison-Paxon Co. v. Caldwell* case, from which we have just quoted.

(a) *The State Supreme Court Decision Is Not Res Adjudicata in the Federal Proceedings, as to the Effect of the Discharge in Bankruptcy, Because the State Court Has No Jurisdiction to Decide the Issues as Presented by Petitioner's Ancillary Bill in Equity* ***Herein.***

In *Freud's Estate,* 134 Cal. 333, 66 P. 476, the Court says:

"And then the court in that proceeding had no jurisdiction to determine the matter involved in a dis-

tribution. The probate court has exclusive jurisdiction of that, and cannot be deprived of its power in this way. The exclusive jurisdiction of that court over these matters was asserted in Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; and it was so expressly held in Toland v. Earl, 129 Cal. 148, 61 Pac. 914. I cannot do better upon this proposition than to quote from Van Fleet on Former Adjudication (page 38): 'It was said in the Duchess of Kingston's Case that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter directly in question in another court.' The correct principle involved, in my opinion, in the phrase, 'court of concurrent jurisdiction,' was first formulated by a British court sitting in India, as follows: *'In order to make the decision of one court final and conclusive in another, it must be a decision of a court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is put in evidence as conclusive.'* This formula has been affirmed twice by the court of Indian appeals." (Emphasis ours.)

It is implicit in the doctrine of *res adjudicata* that the Court entering the judgment which is asserted as an estoppel must be one which has jurisdiction over the subject matter involved.

See, also, 34 *Cor. Jur.* 742; 34 *Cor. Jur.* 768, and cases there cited.

The California Court has no jurisdiction to determine a question such as is involved here concerning the effect of a discharge in bankruptcy upon a particular judgment. This is directly held in *Local Loan Co. v. Hunt* in answer

to the contention that it was necessary for the Federal Court to follow the Illinois decision:

> "We find it unnecessary to consider whether this contention would in a different case find support in S. 34 of the Judiciary Act of 1789 now S. 725, title 28 U. S. C., since we are of the opinion that it is precluded here by the clear and unmistakable policy of the Bankruptcy Act. *It is important to bear in mind that the present case is not one within the jurisdiction of a state court,* but it is a dependent suit brought to vindicate the decrees of a federal court of bankruptcy entered in the exercise of a jurisdiction essentially federal and exclusive in character. And it is that situation to which we address ourselves, and to which our decision is confined."

Further:

> "Petitioner relies upon a number of decisions where other federal courts sitting in bankruptcy have declined to entertain suits similar in character to the present one, on the ground that the effect of a discharge in bankruptcy is a matter to be determined by any court in which the discharge may be pleaded. (Citing cases.) To the extent that these cases conflict with the view just expressed they are clearly not in harmony with the general rule in equity announced by this court."

In so far as the Supreme Court of California assumed to pass on the effect of the discharge in bankruptcy it was wholly without the same jurisdiction as the Bankruptcy Court. The doctrine of *res adjudicata* is not applicable.

Creditor may say that bankrupt chose to submit to the State Court the effect of the discharge in bankruptcy and the nature of the cause of action and ensuing judgment.

But the petitioner never affirmatively sought the State Court forum; the effect of the discharge in bankruptcy became a serious factor only upon the decision of the Supreme Court of California. There was first a garnishment. Bankrupt, using the only defensive procedure provided, filed an affidavit [R. 65] requesting release of the funds, alleging (1) that he was a constitutional officer; (2) had been discharged in bankruptcy; (3) his salary was exempt. The Superior Court ruled that as a municipal officer bankrupt's salary was exempt. On appeal this order was sustained (*Wilson v. Walters*, 112 Pac. (2d) 964), holding that it was unnecessary to rule on the bankruptcy question. Creditor asked and received a hearing in the Supreme Court which unexpectedly raised the bankruptcy matter. To assert, therefore, that the bankrupt chose the state forum is not true. *When the Supreme Court of California in the first ruling in the entire case* in which the bankrupt was aggrieved, held that the bankrupt was not released from the judgment by the discharge in bankruptcy, the bankrupt *immediately sought* the intervention of the equitable powers of the Bankruptcy Court by the instant proceeding.

We must remember again that this was a *surprise ruling* of the California Supreme Court because, on the attachment issue, it overruled *Gamble v. Utley*, 86 Cal. App. 414 (which had long been the rule of decision in California), and on its ruling as to the nature of the State Court judgment it overruled the case of *Marr v. Superior Court*, 30 Cal. App. (2d) 275, 86 Pac. (2d) 141, relied upon by this petitioner, which had long been the rule of decision following *Crawford v. Burke*, 195 U. S. 176, and because the California Supreme Court in the Walters decision repudiated the decision of this Court in

Crawford v. Burke, supra. That decision was rendered on December 2, 1941, and at once (December 23, 1941) petitioner filed in the Bankruptcy Court his petition for an injunction on the ground that by his discharge he was released from the debt evidenced by creditor's judgment [R. 11].

This Court has recognized *unanticipated dispositions* of Federal claims in State Supreme Courts. In *Saunders v. Shaw,* 244 U. S. 317, 320, the Federal claim arose from the *unanticipated disposition* of the case at the close of the proceedings in the State Supreme Court. And in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 678, the federal claim was based upon the *unanticipated act* of the State Supreme Court in giving to a statute a *new construction* which threatened rights under the Constitution by the *simple device of overruling one of its own decisions* which had long been the rule of decision in the State of Missouri and had been *consistently followed* for many years.

(b) *The State Supreme Court's Decision Is Not Res Adjudicata Because It Is Not a Final Judgment.*

In *American Nat. Ins. Co. v. Yee Lim Shee,* 104 Fed. (2d) 688, (9 cir.) the Court said: "No question becomes *res adjudicata* until it is settled by final and conclusive adjudication. 2 Freeman on Judgments, 2d Ed., Sec. 717, p. 1512; Calif. C. C. P., Sec. 1908," and see *Merriam v. Saalsield* 241 U. S. 22, 60 L. Ed. 868, 872.

The Court will note the final and remanding paragraph in the decision of *Wilson v. Walters,* 119 Pac. (2d) 340, 19 Cal. (2d) 132:

> "The affidavits with respect to what portion, if any, of defendant's salary is exempt from execution under the exemption laws (Code Civ. Proc., sec. 690.11) are conflicting and a determination on that issue should be made by the trial court. The order is reversed, with directions to the trial court to determine what, if any, portion of defendant's salary so levied upon is exempt under section 690.11 of the Code of Civil Procedure, and thereupon enter an order directing the disbursement of such portion to defendant, and any balance remaining to plaintiff in partial satisfaction of her judgment against defendant."

The doctrine adopted in the *Lim Shee* case, *supra,* is also the rule of decision in the State of California.

Pillsbury v. Superior Court, 8 Cal. (2d) 469, 66 Pac. (2d) 149; *Baker v. Eilers Music Co.,* 175 Cal. 652, 166 Pac. 1006; *Ricks Estate,* 160 Cal. 467, 117 Pac. 539; *Bank of America v. Superior Court,* 128 Pac. (2d) 357, *Stockton Works v. Glen's Falls Insurance Company,* 98 Cal. 557, in which the Court said: "There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it is entered and finally determines the right of the parties in relation to the matter in controversy."

The State Court case of *Wilson v. Walters* is still pending in the Superior Court to which it was remanded, and wherein no final judgment has ever been entered and no further proceedings have been had.

(c) *The State Supreme Court Decision Is Not Res Adjudicata as to the Effect of the Discharge in Bankruptcy Because the Decision on Such Point Was Dictum.*

The entire decision of the Supreme Court of California relating to the pleadings, the judgment and the discharge in gratuitous *dictum*. The trial court held bankrupt's discharge did not release creditor's judgment. Bankrupt's motion to release garnishment was granted upon the sole ground that he was a municipal officer, not subject to garnishment. However, the trial court undertook to state as a matter of pure *dictum* that the discharge in bankruptcy was not a release. The order being in favor of the bankrupt, it was wholly unnecessary to rule upon the bankruptcy issue. *Bankrupt was not aggrieved* and therefore did not appeal from the *dictum*. The creditor appealed. The District Court of Appeal, affirming the Superior Court, stated: "This is the sole question necessary for us to determine: Is a Judge of the Municipal Court of the City of Los Angeles a Constitutional Officer of the State of California?" (*Wilson v. Walters,* 112 Pac. (2d) 964.) Thus the Appellate Court *did not examine* the bankruptcy question. The Supreme Court reversed the Appellate Court on the question it had decided. This was a sufficient basis for reversal of the order for it was the *only point upon which the order depended.* Therefore, the opinion and decision of the State Supreme Court upon the

subject of bankruptcy and the pleadings and judgment were unnecessary to its decision and were *dictum.*

Dictum cannot form the basis of any judgment upon which the doctrine of *res adjudicata* may be asserted. *Harriman v. Northern Securities Co.,* 197 U. S. 244, 49 L. Ed. 739, 761; *Cohen v. Virginia,* 6 Wheat. 399, 5 L. Ed. 290; *Carroll v. Carroll,* 16 How. 279, 14 L. Ed. 938; *Freeman on Judgments,* 5th Ed., Vol. 2, p. 1474.

II.

The Circuit Court Erred in Failing to Reverse the District Court for Failing to Make Any Findings of Fact Upon Which to Base its Order, Which Were Mandatory Under Rule 52a Federal Rules of Civil Procedure.

The findings of fact in this case, because of the turn of events in the succeeding proceedings before the Referee, District Judge and Circuit Court may be said to fall into *two categories*:

(1) Findings of fact on the merits;

(2) Findings of fact upon the circumstances of the case from which may be deduced conclusions of law upon the question of what unusual circumstances exist as to warrant the Court in taking jurisdiction.

The Referee made *partial and incomplete findings of fact* on the merits, but he did not make any findings of fact *concerning the circumstances* of the case which would enable the District Judge or the Circuit Court of Appeals to determine whether or not unusual circumstances existed.

In this connection reference is made to the allegations contained in bankrupt's petition to the District Court [R. 3] as follows:

In paragraph II thereof [R. 4]:

> ". . . that although duly notified of the proceedings in bankruptcy and having timely knowledge thereof, said Edith Maud Wilson failed to file a claim in said bankruptcy proceedings."

In paragraph III [R. 5]:

> "That the said Edith Maud Wilson despite such notice and knowledge did nothing with respect to the said liability nor did she at the subsequent hearing on your petitioner's discharge object to the same as she had ample right and power to do under Section 14 of the Bankruptcy Act."

And in paragraph VI [R. 7]:

> "Your petitioner alleges that the said Edith Maud Wilson threatens to, and unless restrained therefrom will proceed with the enforcement of the said judgment of the Superior Court against your petitioner and that if she is allowed to proceed with the enforcement of said judgment, such procedure would nullify the decree of this Honorable Court granting to your petitioner a final discharge from all of his debts and would circumvent the object and purposes of the Bankruptcy Act."

And in paragraph VII [R. 7-8]:

> "That your petitioner is a Judge of the Municipal Court of the City of Los Angeles having assumed that office on August 2, 1937, by appointment of the Governor of the State of California. That all of the salary of petitioner is necessary for the support of his dependents and himself, he being married and

having five dependents besides his wife, three of whom are minor children of school age, his oldest daughter being in her sophomore year in college, and his son being in the last elementary grade in a military academy. That continuous and unrelenting pursuit for the satisfaction of said judgment by said Edith Maud Wilson has caused and will conitnue to cause much damage to your petitioner because of the character of his position and the nature of his public duties. That the work of your petitioner is such that the harassment and annoyance of private litigation is disturbing to his work and the usual attendant publicity accompanying the exercise of the asserted rights of said Edith Maud Wilson to enforce execution of the judgment continues to damage your petitioner irreparably, particularly in view of the fact that your petitioner is by law an elective officer and subject to the will of the people at stated elections within the City of Los Angeles, and further in view of the fact that said Edith Maud Wilson continues to assert that said judgment is based in fraud and is not dischargeable in bankruptcy."

The Referee made no findings of fact concerning the above allegations while making certain findings on the merits.

But he dismissed the case, declining to take jurisdiction. [R. 90] If he did this he had no right to make findings on the merits—but he should have made findings upon the circumstances as disclosed by the evidence which would be controlling on the question of jurisdiction (if he must pursue such a theory).

The District Judge reversed the findings of fact and conclusions of law on the merits, evidently because [R. 104]

(1) he did not agree with them (except on the question of dismissal because of the lack of unusual circumstances);

(2) He felt that findings on the merits were improper if the Court did not assume jurisdiction.

The District Judge then dismissed the petition on the ground that no unusual circumstances existed for assuming jurisdiction, therefore making a conclusion of law based upon findings of fact which did not exist for two reasons:

(1) He vacated all the findings of fact made by the Referee;

(2) The Referee never did find any facts concerning the allegations of *unusual circumstances* as we have just hereinbefore pointed out.

The Circuit Court of Appeals received the case with no findings before it. Petitioner raised the point of findings before the Circuit Court which Court, evidently answering the point, reinstated (we suppose) the findings of fact made by the Referee.

But the case cannot be thus disposed of, and the Circuit Court committed manifest error in so doing because:

(1) It in effect reinstated findings of fact and conclusions of law without giving petitioner an opportunity to attack them and without giving petitioner the benefit of review by said Circuit Court of said findings. Such review of the merits on appeal by the Circuit Court *is a matter of right* enjoyed by petitioner and sustained by

Judicial Code, Section 128, as amended (28 U. S. C. A. Sec. 225), but petitioner now stands *deprived of such right.*

(2) It affirmed the Referee in dismissing the case upon his holding that no unusual circumstances existed for the assumption of jurisdiction, when the Referee *had not made any findings of fact concerning the total of the circumstances revealed by the evidence.*

Rule 52-a of the Federal Rules of Civil Procedure provides in part as follows:

> "In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . ."

The failure of the lower Court to comply with the above rule is manifest error. It has been held that fair compliance with this rule is of the highest importance to proper review of a Court's action in granting or refusing an injunction. In the case of:

> *Mayo v. Lakeland Highlands, etc. Co.*, 309 U. S. 310, 60 S. Ct. 517, 84 L. Ed. 774,

this Court said (at p. 316):

> "The observations made in the course of the opinion are not, in any proper sense, findings of fact upon these vital issues. Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony.

"It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52 (a) of the Rules of Civil Procedure."

Further (page 317):

"Moreover, if appellants conceived themselves aggrieved by the action of the court upon motion for preliminary injunction, they were entitled to have explicit findings of fact upon which the conclusion of the court was based. *Such findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal.*" (Emphasis added.)

Further (page 319):

"We reverse the decree and remand the cause to the court below with instructions that, if the motion for interlocutory injunction is pressed, the parties, if they desire it, may be afforded a further hearing, *and any action taken by the court shall be upon findings of fact and conclusions founded upon the evidence, in accordance with Rule 52(a) of the Rules of Civil Procedure.*" (Emphasis added.)

And the Circuit Court of Appeals for the 9th Circuit very recently ruled upon the same point in the case of:

Perry v. Bauman, 122 Fed. (2d) 409, 410,

wherein it said:

"Thus each of the motions raised issues of fact. The issues were tried by the court without a jury. Evidence was received and, upon consideration there-

of, the following order was entered: 'Motion to dismiss proceedings granted.' The order did not state, nor does the record show, which of the several motions to dismiss was granted, nor on what ground or grounds dismissal was ordered. The Court made no findings, stated no conclusions. Order 37 of the General Orders in Bankruptcy, 11 U. S. C. A. following section 53 provides: 'In proceedings under the (Bankruptcy) Act the rules of Civil Procedure for the District Courts of the United States (28 U. S. C. A. following section 723 c) shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be.' Rule 52(a) of the Rules of Civil Procedure provides: 'In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.' Rule 52(a) is not inconsistent with the Bankruptcy Act or with the General Orders in Bankruptcy. It therefore should have been followed in this case.

"Order reversed and case remanded to the District Court, with directions to find the facts specially, state separately its conclusions of law thereon and direct the entry of the appropriate judgment, all in conformity with Rule 52(a), *supra*."

The following is appended to the opinion under note 2:

"The evidence consisted of eight affidavits—four supporting and four opposing the motions to dismiss."

III.

The Debt Represented by the Judgment of Creditor Against Bankrupt Is Not a Liability for Obtaining Money or Property by False Pretenses or False Representations, Within the Meaning of Section 17(a)2 of the Bankruptcy Act (11 U. S. C. A., Sec. 35) But Is a Liability Ex Contractu, and Therefore Discharged.

In order to determine this question we first look at the wording of the judgment [R. 46]. If any wording of the judgment is so ambiguous as to create a doubt as to its nature then the Court shall look to all of the pleadings in this case to determine the nature of the judgment. (1 C. J. S. P. 1100, Par. 46.)

The California Supreme Court (*Wilson v. Walters*, 19 Cal. (2d) 111), interprets this judgment as being one for obtaining property by false pretenses or false representations by relying upon the clause therein contained "in accordance with the allegations of the complaint." Assuming that it is proper to separate this individual clause from its context (which we do not concede) it is immediately apparent from an examination of the record in the case *that these words relied on by that Court to interpret the nature of the judgment are the very words which render the judgment ambiguous.*

A consent judgment is a contract and shall be construed as such. (34 *C. J.* 133 (*Corpus Juris*).) And especially is this judgment a contract because it is based on a stipulation therefor and the stipulation is a contract —and it must be construed by the rules governing the construction of contracts to make a valid contract. In this case a valid stipulation for judgment must be (1) parties;

(2) legal subject matter; (3) and a valid consideration, and as to all of the necessary elements there must be a *meeting of the minds.* Do the words *"in accordance with the allegations of the complaint"* present such a *clear, precise and unambiguous statement as to the basis for the judgment* as to suggest that there was a meeting of the minds thereon?

> "A judgment by consent, being regarded as a contract between the parties must be construed as any other contract. Its operation and effect must be gathered from the terms used in the agreement, and it should not be extended beyond the *clear import of* such terms."
>
> 34 *Corpus Juris,* 133, Sec. 337.

This is also true of the same clause in the stipulation for judgment [R. 44]: "In accordance with the allegations of the complaint." These are not descriptive words nor are they *words of admission* but they serve only the purpose of *reference*—they are *directional* words that point the way in *very general language* to the "allegations of the complaint."

To what allegations?

It does not say *"all"* of the allegations in the complaint.

It does not say *which* of the *conflicting* allegations shall be preferred above the others.

It does not say which of the *obviously conflicting* theories shall be adopted or which shall be discarded.

It does not say which of the *obviously conflicting* causes of action shall be adopted as being the *gravamen* or *gist* of plaintiff's claim or which shall be disregarded.

To *what allegations* of the complaint does this language in the judgment point? We ask it again and again—The only logical answer is: Viz: To the *material* allegations of the complaint. What are the material allegations of the complaint? They are the allegations which are *necessary and material* to the *statement* of the *gravamen or gist* of the complaint. *All other allegations are surplusage.*

Since the judgment does not solve the problem by the use of these words and since the stipulation for judgment does not solve the problem by the use of these words, plaintiff in the case cannot rely on them, nor can the Supreme Court of California attach the *onus of fraud* to this defendant by their use alone.

We must go beyond these words to the complaint itself. The Supreme Court of California did not go that far back nor did the District Court nor the Circuit Court, but we think this Court will.

Only one question is here, viz: What is the *gravamen* of the complaint? Did plaintiff rely *when filing the complaint* upon a cause of action *ex delicto* or one *ex contractu.* It is fundamental that she could not do both.

For the answer to this question we examine the complaint, its title, its allegations and its prayer, as to the remedy sought.

After we examine the complaint and pleadings if *ambiguity still remains* so that it is not clear whether the action is *ex contractu* or *ex delicto* then under the law it

must be presumed to be an action *ex contractu* because the construction should be against the pleader, and the liability in contract is *less extensive than the liability in tort.*

Nathan v. Locke (1930), 108 Cal. App. 138, 287 Pac. 555;

May v. Georger, 47 N. Y. S. 1057, 1059.

A. The Judgment of Creditor Against Bankrupt [R. 46] in Apportioning Damages Between the Two Co-defendants Is Indisputably a Judgment on Contract.

A most persuasive argument on this point is set forth in the order of the District Judge in this cause below, vacating submission and setting cause for reargument [R. 101-102]. We quote:

"A study of the record on review suggests the following considerations:

The second cause of action which charged misrepresentation in obtaining the loan advances was, like the other three, directed at both defendants. Judgment was prayed for jointly against both defendants for the principal sum of $6430.00, although the amount was split up in several sums for the computation of interest. The damage alleged to flow from the misrepresentations in the second cause of action was the sum of $6430.00, being the total sum alleged to have been advanced in the other counts of the Complaint.

We thus have through the Complaint a prayer for a judgment *in solido* against both defendants. In the stipulation for judgment, which was carried into the judgment, there was a segregation of liabil-

ties and judgment was stipulated to be rendered and then rendered jointly against Walters and Johnston in the sum of $5700.00, with interest at seven per cent from September 28, 1929, and then against Johnston individually for the balance of $730.00, divided into three sums for the purpose of computing interest. It is the law of the United States and the law of California that the liability of joint tort feasors cannot be segregated and that only one judgment can be entered. (Washington Gas & Light Co. v. Lansden, 1898, 172 U. S. 534, 552-53; Reynolds v. New York Trust Co., 2 Cir., 1911, 188 Fed. 611; Miller v. Union Pacific Ry., 1933, 290 U. S. 227; Bee v. Cooper, 1932, 217 C. 96; Curtis v. San Pedro Transportation Co., 1935, 10 C. A. (2) 547; Phipps v. Superior Court, 1939, 32 C. A. (2d) 371.)

As the second cause of action alleged misrepresentations by both defendants and sought judgment against both for the total debt of $6430.00, does not the fact that the stipulation for judgment and the judgment divided the liability by awarding judgment against both defendants jointly for $5700.00 and against the defendant Johnston alone for $730.00, indicate that the judgment stipulated to was one for money loaned and advanced on a contractual basis, rather than a judgment awarding damages for a tort?

In view of the fact that damages in tort cannot be apportioned as between joint tort feasors according to their degree of participation, does not the fact that, despite the charge against both, the judgment proceeds to make such apportionment indicate that it was not a judgment on a cause of action for tort?"

Neither counsel, nor the lower Courts has by citation of authorities or otherwise assailed the correctness of the above memorandum opinion, and we submit there is no answer to it. It also has support in the following cases:

Thompson v. Catalina, 205 Cal. 402, citing:
Davis v. Hearst, 160 Cal. 143;
Oldham v. Aetna Ins. Co., 17 Cal. App. (2d) 144;
Sparks v. Bernstein, 19 Cal. (2d) 308.

B. A Further Analysis of the Complaint [R. 28, 43] on Which the State Court Judgment Is Based Clearly Shows That the Action Is Contractual in Its Nature, and By the Overwhelming Weight of Authority the Complaint and Resulting Judgment Sound in Contract.

Said complaint was in four counts and was entitled "Complaint for Damages and for Breach of Contract."

The first cause of action may be described as one on an express promise to repay money loaned.

The second cause of action contains certain allegations concerning false representations.

The third cause of action is an action upon a promissory note.

The fourth cause of action is upon money loaned.

It is clearly apparent that *three* of the *four causes of action* stated in the complaint are actions *ex contractu.* The relief prayed is for judgment as upon the causes of action *ex contractu,* including the *specific amounts* set forth in the *contracts* pleaded.

It should be noted that the prayer *requests attorney's fees,* which are stipulated in the contracts pleaded, and further requests *interest at 8 per cent, as stipulated in*

the contracts pleaded, and does not request interest at the legal rate.

It should be further noted that *no other recovery is requested* in the way of damages, or otherwise, than the *normal recovery under the contracts.*

In *May v. Georger,* 47 N. Y. S. 1057, the Court said:

> "If there is any doubt as to whether an action is in contract or tort, it must be resolved against the pleader and the complaint held to be one in contract, as the liability is less extensive."

The policy of the law both in California and throughout the United States is well settled in regard to the "yard sticks" which may be applied in determining whether an action is *ex contractu* or *ex delicto,* it frequently and for a variety of reasons becoming necessary to determine whether a particular action *sounds in contract or in tort.* The effect of a bankrupt discharge is but one of these reasons, other reasons being the right to a writ of attachment, whether a cross-complaint may be interposed, whether the right of contribution exists, whether the release of one defendant operates as a release of others, and whether or not certain types of relief or forms of damages may be granted.

In *Nathan v. Locke,* 108 Cal. App. 158, 287 Pac. 550 (1930), plaintiff sued for contribution against defendants upon a final judgment which he had paid. The one issue involved in the appeal was whether the action, in which the judgment was rendered, was *ex contractu* or *ex delicto,* it being conceded that in California there is no right of contribution between joint tort-feasors. Therefore, if the action is one in tort, the respondent may

not seek contribution from the appellants. The Court says:

> "Another rule which is universally accepted in determining the nature of an action of this kind is that, when it is not clear to which class the action belongs, *it will ordinarily be construed as in contract rather than in tort. 1 C. J. 1015. The reason for this rule is that the construction should be against the pleader and the liability in contract is less extensive than the liability in tort. May v. Georger,* 21 Misc. Rep. 622, 47 N. Y. S. 1057, 1059. Another guide is noted in 1 Corpus Juris, p. 1016, where it is said: 'Where a complaint states a cause of action in contract and it appears that this is the *gravamen* of the complaint, *the nature of the action is not changed by the fact that there are also allegations in regard to tortious conduct on the part of defendant.* * * *'" (Emphasis ours.)

In *Hill v. Superior Court,* 16 Cal. (2d) 527, there was a motion to vacate an attachment and the issue was whether the complaint containing six causes of action stated a cause of action in contract. The Court said:

> "On the other hand, where the facts show a misappropriation of funds one may waive the tort and sue upon an implied contract for money had and received. *Bechtel v. Chase,* 156 Cal. 707, 106 P. 81; *Hoare v. Glann,* 176 Cal. 309, 168 P. 346; *Philpott v. Superior Court,* 1 Cal. 2d 512, 36 P. 2d 635, 95 A. L. R. 990. Such an action is based upon the tort of embezzlement, yet the action is one *ex contractu,* in which the plaintiff may have a writ of attachment. *Los Angeles Drug Co. v. Superior Court,* 8 Cal. 2d 71, 63 P. 2d 1124; *McCall v. Superior Court,* 1 Cal. 2d 527, 36 P. 2d 642, 95 A. L. R. 1019."

In *Dougherty v. California Kettleman Oil Royalties,* 13 Cal. (2d) 174, appellant contended that one Ochsner was a joint tort-feasor, and that an agreement between respondent and the representative of Ochsner's estate constituted a settlement of a tort action, releasing all other tort-feasors, and therefore that appellant was released from liability under a judgment. The Court said:

> "In our opinion, the rule and theory of *Bee v. Cooper, supra,* and the other cases cited by appellant, have no application to the facts of the instant case, for the reason that the allegations of the complaint, the theory of the parties on the trial and on appeal, and the rationale of the opinion of this court, clearly demonstrate that basically the action sounds in contract and not in tort. Dougherty was not seeking damages based upon the fraud of appellant, but was seeking to have it determined that the appellant held the title to the royalties in trust for him. That action was basically predicated upon respondent's written but unsigned contract with Ochsner. *The contract was the sine qua non of the cause of action.*
>
> "A reading of this court's opinion on the prior appeal conclusively demonstrates the cause of action sounds in contract.
>
> "It is true that under the facts of the case Ochsner and appellant *acted fraudulently* in concealing the existence of the Coast Land Company deal from Dougherty, and in the manner in which they dealt with the royalties. These facts are alleged in the complaint and recounted in the opinion of this court as part of the facts of the case. *The cause of action, however, was not predicated on that fraud.* It would have existed whether or not such actual fraud was present. It is also true that under the pertinent provisions of the Civil Code (sec. 2228 *et seq.,*

see particularly sec. 2234) it is a fraud upon the beneficiary for a trustee to transfer trust property to another without protection and in violation of the beneficiary's rights. *There can be no doubt that Dougherty could have sued Ochsner and appellant for damages for this and the other frauds, but the point is he did not, but elected to sue for the enforcement of his contract with Ochsner. It is elementary that a person injured under circumstances where he may sue in either tort or contract, may waive the tort and sue on the contract. Stanford Hotel v. Schwind Co.,* 180 Cal. 348, 181 P. 780; *Philpott v. Superior Court,* 1 Cal. 2d 512, 36 P. 2d 635, 95 A. L. R. 990. These same cases establish that the *mere fact a pleading contains allegations of fraud does not convert a contract action into a tort action.*" (Emphasis ours.)

In *Los Angeles Drug Co. v. Superior Court in and for Los Angeles County,* 8 Cal. (2d) 71, 65 Pac. (2d) 1124 (1936), the question involved was whether a writ of attachment should issue.

The Court said:

"It is well settled that where personal property is converted the injured party may 'waive the tort and sue in assumpsit.' *Bechtel v. Chase,* 156 Cal. 707, 711, 106 P. 81, 83; *Corey v. Struve,* 170 Cal. 170, 172, 149 P. 48, 49, and *Hoare v. Glann,* 176 Cal. 309, 313, 168 P. 346. Nor is the aggrieved party in this jurisdiction limited, as he is in some others, to those cases where the wrongdoer has sold or converted the property into money.' *Bechtel v. Chase.*

"Does the complaint here declare in assumpsit? In *Corey v. Struve, supra,* the allegations of the complaint were in all material respects identical with

those now before us, and the court said: 'While the complaint does allege that the property was "converted" by the defendants, we think that the action was in reality one in assumpsit for the value of the property sold, or perhaps it might be more aptly characterized as one in the nature of a suit for money had and received.' It is manifest from the allegations that plaintiff is seeking to receive the reasonable value of the goods taken. This is sufficient to characterize its complaint. In other words, while the tort is the cause of injury, yet the action is one *ex contractu.*"

And see:

Chapman v. State, 104 Cal. 690, 38 Pac. 457, 458;

Stark v. Wellman, 96 Cal. 400, 31 Pac. 259, 260.

C. The Complaint in the State Court Action Sounding in Contract, Creditor, by Bringing Her Action in Such Form, Waived the Alleged Fraud and Sued in Contract.

(1) THIS IS TRUE UNDER EXISTING CALIFORNIA LAW WHICH THE SUPREME COURT OF CALIFORNIA FAILED TO FOLLOW (*Wilson v. Walters,* 19 Cal. (2d) 111).

We feel that the California Supreme Court settled this question in bankrupt's favor some years ago, when it reached a point in the history of California jurisprudence where it became necessary to settle the law as to the right of a plaintiff to a writ of attachment, where fraud is alleged in one count of the complaint and there is also included a count for money had and received. Two cases decided on the same day by reference one to the other, form a complete analysis of the situation confronting the court at that time. Because of their extreme length,

we refrain from quotations at this place, but respectfully suggest that an examination of them by this Honorable Court will fully justify the position of bankrupt in this matter as *to waiver of tort,* where, as in the instant case, the complaint [R. 28] *declared in inconsistent counts of both tort and contract.* We refer to:

Philpott v. Superior Court, 1 Cal. (2d) 512 (1934), **and**

McCall v. Superior Court, 1 Cal. (2d) 527.

And on the same point:

In *California Treasure Box v. Superior Court,* 2 Cal. App. (2d) 202, 37 Pac. (2d) 731 (1934), the court said:

> "It is alleged in the complaint that corporate stock was purchased by plaintiff under defendant's false pretenses and that plaintiff promptly rescinded. The prayer is for the return of the purchase money paid with interest. The facts bring the issue strictly within the principle expressed in *McCall v. Superior Court,* 1 Cal. (2d) 527."

At 1 *C. J. S.,* page 1100, paragraph 46, it is said:

> "While the *prayer for relief or measure of damage sought* does not necessarily determine the character of the action, nor is it binding or conclusive, it may be material in the determination of the question and is, therefore, entitled to consideration, *and in case of doubt, will often determine the character of the action,* and indeed there are actions whose character is necessarily determined thereby; thus where a *relief* or a *measure of recovery is sought* which is adapted to one form of action only, the action will be considered as such. Where under the circumstances, either form of action might be maintained, it must be determined from the allegations of the complaint what is the

gravamen of the complaint and substance of the cause of action relied on. Where a complaint states a cause of action in contract and it appears that this is the *gravamen* of the complaint, the nature of the action as *ex contractu* is not affected or changed by the fact that there are *also allegations in regard to tortious conduct on the part of the defendant such as allegations in regard to negligence, or fraud, or conversion, which in such cases may be disregarded as surplusage. Hence although an action be in form as for a tort, yet if the subject of it be based on contract the suit will be attended by all the incidents of an action ex contractu.*" (Emphasis ours.)

It should be remembered that in the case at bar, both the prayer for relief [R. 43] and the form of the judgment [R. 46-47] are in their nature applicable *only to contractual actions.* The complaint [R. 28] is also denominated "Complaint for damages and for breach of contract."

In the case of *Beatty v. Pac. States Savings & Loan Co.*, 4 Cal. App. (2d) 695, the court said in part:

> "We do not think, however, that the rule permitting the pleading of inconsistent causes of action in the same complaint was ever intended to sanction the statement in a verified complaint of certain facts as constituting a transaction in one count or cause of action, and in another count or cause of action a statement of contradictory or antagonistic facts as constituting the same transaction. In short, the rule does not permit the pleader to blow both hot and cold in the same complaint on the subject of facts of which he purports to speak with knowledge under oath.

"(3) Under the rules above stated it became the duty of the trial court herein, upon the close of the evidence, to decide which of the antagonistic causes of action had been sustained, and in so deciding the court was required to take as true the averments in the complaint which bore most strongly against the pleader, and which were sustained by proofs in the form of evidence or admissions of the pleadings."

The Federal courts have definitely indicated that the prayer of the complaint is important in determining the character of an action. As was said by the District Court below, in the case of *Wenzel & Henoch Construction Company v. Metropolitan Water District*, 18 Fed. Supp. 616, 619, speaking through Judge Yankwich:

"It is apparent from the motion that the defendant treats the first cause of action as if it sought to rescind and cancel the opinion and notice. There is no prayer in the complaint to that effect."

Further in the same case on page 621, Judge Yankwich says:

"If we apply the touchstone of the principles to the first count of the complaint, it is evident that the plaintiff does not seek equitable relief. It seeks damages from the District for breach of contract."

We submit that exactly the same type of relief is sought by the complaint here under consideration and no other.

And in a case just decided by the Circuit Court of Appeals for the Eighth Circuit:

Peitzman v. City of Illmo (Apr. 17, 1944), 141 Fed. (2d) 956, 962,

the Court announced the same theory although the situation was opposite from the case at bar as to facts. The Court says:

> "In case of doubt as to the nature of the cause of action, the *prayer* of the complaint may be looked to and where the damages sought, whether exemplary or punitive, are inconsistent with an action for damages on breach of contract, but are consistent with an action sounding in tort and the complaint may otherwise sustain such construction, it will be considered that plaintiff intended to sue in tort."

(2) AND THE DOCTRINE OF THE WAIVER OF FRAUD HAS BEEN ACCEPTED AND FOLLOWED IN BANKRUPTCY CASES (BEGINNING WITH CRAWFORD V. BURKE, 195 U. S. 176, WHICH CASE WAS EXPRESSLY REPUDIATED BY THE CALIFORNIA SUPREME COURT (WILSON V. WALTERS, 19 CAL. (2D) 111) AND BY OVERRULING MARR V. SUPERIOR COURT, 30 CAL. APP. (2D) 275, 86 PAC. 141).

In the case of *Collins v. McWalters,* 72 N. Y. S. 203, 6 A. B. R. 593, it is said (p. 595):

> "The bankruptcy law of 1898 exempts from discharge 'judgments in actions for fraud.' Section 17, subd. 2. But this provision appears to apply only to cases where fraud is the gravamen of the action, and *in which proof of fraud is essential to recovery,* and does not include a judgment rendered in an action in which the right of recovery is based upon an act not essentially fraudulent, although fraud may be incidentally shown." (Italics ours.)

It cannot be said that fraud is the *gravamen of the instant action,* or that proof of fraud was *essential to recovery.*

In the *Matter of Arkell*, 72 N. Y. S. 555, 6 A. B. R. 650, defendant judgment debtor made a motion to vacate the judgment on the ground that it had been discharged in bankruptcy. The case is somewhat similar to that at bar in that a stipulation for judgment was entered into after the filing of the complaint. There were various allegations of misrepresentation which the court stated were somewhat indefinite in their nature. The court said (p. 652):

> "The cause of action alleged was for a breach of a contract by the defendants; and, so far as a recovery in the action is concerned, the allegations of misrepresentations were merely surplusage, and did not at all affect the right of the plaintiffs to recover."

In the case of *Hargadine-McKittrick Dry Goods Co. v. Hudson*, 6 A. B. R. 657, the action was on a judgment to which the defendant pleaded a discharge in bankruptcy. The case is similar in that the suit involved promissory notes and the claim was made that the discharge was unavailable because of fraud. The court said (p. 659):

> "Where a note is founded in fraud, two remedies exist. The holder may waive the contract and sue for the fraud, or he may sue upon the note and waive the fraud. The plaintiff in this case chose the latter course, and took its judgments on the notes."

Another leading case upon this subject is *Sanger Bros. v. Barrett*, 221 S. W. 1087, 45 A. B. R. 543. Appellants claimed that the respondent's bankruptcy did not relieve him from liability. The court stated that the appellants had the right to waive the tort and rely upon the contract, thereby rendering the claim based on the contract prov-

able, which contract was discharged in the bankruptcy court.

The leading case on the point of waiver of fraud so as to render a claim dischargeable in bankruptcy is *Crawford v. Burke,* 195 U. S. 176, 49 L. Ed. 147. *The case is on all fours with the case at bar.* The action was to recover damages for the willful and fraudulent conversion of plaintiff's interests in shares of stock. There were *ten counts* in the declaration. The *first five* counts alleged that defendants, employed as brokers and in possession of certain securities of plaintiff, wilfully, wrongfully and *fraudulently,* and *with intent to cheat and defraud plaintiff,* converted his stock to their use. The last five counts allege that after the willful and fraudulent conversion defendants fraudulently represented to plaintiff that they still had the stock and by fraudulent representations secured from plaintiff an additional large sum of money as margins. The defendants pleaded their discharge in bankruptcy, contending plaintiff's claims were provable and plaintiff averred that the claims were excepted from the operation of the discharge.

This Court reversed the judgment of the Supreme Court of Illinois, saying:

> "We are, therefore, of opinion that if a debt originates or is 'founded upon an open account, or upon a contract, expressed or implied,' it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover, as for a fraudulent conversion, instead of in assumpsit, for a balance due upon an open account. It certainly could not have been the intention of Congress to extend the operation of the discharge under Sec. 17 to debts that were not provable under Sec. 63a. It results from the

> construction we have given the latter section that all debts originating upon an open account, or upon a contract, express or implied, are provable, though plaintiff elect to bring his action for fraud."

We submit the above case as *decisive* of the case at bar inasmuch as the claim in the instant case arose upon an express contract provable in the bankruptcy, to-wit, the promissory notes.

The case of *Crawford v. Burke, supra*, has never been overruled and has been consistently cited with approval and the principal thereof upheld in each of the following cases: *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762; *Clark v. Rogers*, 228 U. S. 534, 57 L. Ed. 953; *Kreitlein v. Ferger*, 238 U. S. 21, 57 L. Ed. 1184; *Grant Shoe Company v. W. M. Laird Company*, 212 U. S. 445, 53 L. Ed. 591; *Schall v. Camors*, 251 U. S. 239, 64 L. Ed. 247; *Brown v. O'Keefe*, 300 U. S. 598, 81 L. Ed. 827.

The above case was followed in California in *Marr v. Superior Court*, 30 Cal. App. (2d) 275, 86 Pac. (2d) 141, until the Supreme Court of California in *Wilson v. Walters*, 19 Cal. (2d) 111 overruled *Marr v. Superior Court*, and in so doing repudiated *Crawford v. Burke, supra*.

The facts in said *Marr v. Superior Court, supra*, are almost identical with those in the case at bar. The complaint set up various allegations of fraud, in addition to the ordinary allegations of a promissory note. The answer, as in our case, denied all of the allegations charging fraud and deceit. The Court held that the discharge in bankruptcy of defendant was a *meritorious defense*, citing specifically *Crawford v. Burke, supra*, and also *Tindle v. Birkett*, 205 U. S. 183. Then in *Wilson v. Walters, supra*, the Supreme Court of California *in reversing*

Marr v. Superior Court repudiated *Crawford v. Burke, supra,* and *Tindle v. Birkett, supra,* both decisions of this Honorable United States Supreme Court, in direct point) upon the theory that *Crawford v. Burke* and *Tindle v. Birkett* were rendered *inapplicable* because of the 1903 amendment to the Bankruptcy Act.

However, each of the above cited cases decided by this Honorable Court beginning with *Clark v. Rogers, supra,* was decided long after the 1903 amendment to the Bankruptcy Act which puts the Supreme Court of California in complete error in its analysis of the binding effect of *Crawford v. Burke.*

Tindle v. Birkett, supra, carried the rule of *Crawford v. Burke* into and made it directly applicable to those cases involving fraud without reference to persons acting in a fiduciary capacity.

In 1913, some *ten years* after the 1903 amendment to Section 17 of the Bankruptcy Act we find the case of *Clark v. Rogers, supra,* expressly approving and following not only *Crawford v. Burke, supra,* but also *Tindle v. Birkett, supra,* so that the doctrine of both cases is therein expressly carried by this Honorable Court beyond the 1903 amendment to the Bankruptcy Act. Following the *Clark* case the *Crawford* case was approved in *Kreitlein v. Ferger, supra* (decided June 1, 1915), wherein this Honorable Court said:

> "It seems to have been claimed that the judgment was not a provable debt within the meaning of sec. 63a (4), of the bankruptcy act. But the special find-

ing of the jury in that case showed that in purchasing the flour Kreitlein had not made any fraudulent concealment or misrepresentation as to his financial condition. *Besides, the judgment was a provable debt even though rendered in a suit where the creditor had elected to bring an action in trover, as for a fraudulet conversion, instead of assumpsit for a balance due on open account. Crawford v. Burke,* 195 U. S. 177, 193, 49 L. ed. 147, 153, 25 Sup. Ct. Rep. 9." (Italics ours.)

In the case of *Grant Shoe Co. v. W. M. Laird Co., supra,* the court said:

"On the other hand, by the equally express words of sec. 63a, among the debts that may be proved are those founded upon a contract, express or implied. Again, by sec. 17, the discharge is of all 'provable debts' with certain exceptions, and it would not be denied that this claim would be barred by a discharge. Tindle v. Birkett, 205 U. S. 183, 51 L. Ed. 762, 27 Sup. Ct. Rep. 493."

The case of *Schall v. Camors, supra,* which cites with approval the *Crawford, Tindle, Clark* and *Grant Shoe* cases, holds that where, by means of a tort, the tort feasor obtains something of value for which an equivalent price ought to be paid, even if the tort as such be forgiven, there may be a provable claim *quasi ex-contractu,* and further holds that the only *ex-delicto* claims which Section 63 does not authorize the liquidation and proof of are those unaffected by contract, express or implied.

D. The Burden of Proof in This Case Is Upon the Creditor to Establish That the Judgment Is Excepted From the Operation of Bankrupt's Discharge, and This Burden Has Not Been Sustained.

We quote from *Collier on Bankruptcy*, 14th Edition, Vol. 1, at page 1606:

> "In order that a judgment based upon a fraudulent representation may be excepted from the operation of a discharge, the *record in the action must show that fraud and deceit were the 'gist and gravamen'* of the action. . . ."

And on page 1608 of the same volume, we quote:

> *"The burden of proof, however, is upon the creditor who claims that his duly scheduled debt is excepted from the operation of the discharge in bankruptcy because of the false representations or pretense."* (Emphasis ours.)

And again we quote a portion of Section 17.31 beginning on page 1669 of the same volume:

> "The introduction in proof of a certified copy of an order of discharge makes out a *prima facie* defense, and the *burden of proof rests with the plaintiff to show that, because of the nature of the claim, the debt sued upon was excepted by law from the operation of the discharge."* (Emphasis ours.)

In *Guindon v. Brusky* (Supreme Court, Minn. 1919), 170 N. W. 918, 919, the court said:

> "One other consideration may be noted. It is conceded that the complaint states a cause of action on contract. It must be conceded that a right of recovery on contract was submitted to the jury. *Let it be assumed that there was alleged in the complaint and submitted to the jury a right of recovery for obtaining property by false pretenses or false repre-*

sentation; and that the jury might have found for the plaintiff *upon one or the other*, or even on both if they were not so inconsistent as to prevent it.

"The burden of proof is upon the creditor who claims that his duly scheduled debt is excepted from the operation of the discharge. Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060; *In re* Grount, 88 Vt. 318, 92 Atl. 646, Ann. Cas. 1917A, 210; *In re* Levitan (D. C.), 224 Fed. 241; Hallagan v. Dowell, 179 Iowa, 172, 161 N. W. 177; Burnham v. Noyes, 125 Mass. 85; Sherwood v. Mitchell, 4 Denio (N. Y.) 435. *If under the pleadings and the charge a judgment might be based on contract, or on fraud, and there is nothing but the pleadings and charge upon which to determine the fact, the party having the burden of proving the one or the other fails to sustain it, and so* does not prove his cause of action or defense. See Hallagan v. Dowell, 179 Iowa, 172, 161 N. W. 177; Cooke v. Plaisted 181 Mass. 82, 62 N. E. 1054. This is a necessary result." (Emphasis ours.)

And in *In re Levitan* (D. C. New Jersey, 1915), 224 Fed. 241, 243, the court said:

"The liability underlying this judgment, as shown by the foregoing recital of facts, and which record controls this motion, is a provable debt in bankruptcy. Sections 17 and 63a (1), Bankr. Act; Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; Tindle v. Birkett, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762; Friend v. Talcott, 228 U. S. 33 Sup. Ct. 505, 57 L. Ed. 718; F. L. Grant Shoe Co. v. Laird, 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591. *It being a provable debt in bankruptcy, the burden of proof is upon the judgment creditor to show that such liability is within the exception of section 17a (2). In re* Grout (Vt.), 92 Atl. 646, 33 Am. Bankr. Rep. 789. *This burden has not been*

sustained. The record negatives any such wrongdoing as is necessary to constitute maliciousness within the meaning of such section."

And in the case of *Kreitlein v. Ferger*, this Court says:

"There are only a few cases dealing with the subject but they almost uniformly hold that where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order makes out a *prima facie* defense, *the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to* give notice or other statutory reason, the debt sued on was by law excepted from the operation of the discharge. Roden Co. v. Leslie, 169 Alabama, 579; Tompkins v. Williams, 206 N. Y. 744, affirming the opinion in 137 App. Div. 521; Van Norman v. Young, 228 Illinois, 425; Beck v. Crum, 127 Georgia, 94; Laffoon v. Kerner, 138 N. Car. 281. Compare Hancock v. Farnum, 176 U. S. 645. There were some decisions to the contrary under the Act of 1841." (Emphasis ours.)

We earnestly urge that this Honorable Court grant the writ of certiorari for the reasons hereinbefore set forth, and submit that if the writ is granted the ultimate decree should reverse the decision of the Circuit Court of Appeals for the Ninth Circuit and the decision of the District Court of the United States for the Southern District of California, Central Division.

Respectfully submitted,

SAMUEL P. BLOCK,
Counsel for Petitioner.

PIERSON & BLOCK,
Of Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 216

BYRON J. WALTERS,

Petitioner,

vs.

EDITH MAUD WILSON,

Respondent.

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT.

CHARLES E. BEARDSLEY,
601 Rowan Building, Los Angeles,
W. CLOYD SNYDER,
1124 Fair Oaks Avenue, South Pasadena,
Counsel for Respondent.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

STATUTES.

TEXTBOOKS.

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Statement of Respondent's Case.

Respondent respectfully prays that the petition herein be denied and in assigning her reasons therefor,

(1) Denies that the decision of the United States Circuit Court of Appeals, Ninth District, herein, is in conflict with any appellate local decisions, or with any decisions of the same court, on the same matter.

(2) Denies that said decision is in conflict with the decisions of other Circuit Courts of Appeals.

(3) Denies that said decision fails to follow applicable decisions theretofore rendered by the United States Cir-

cuit Court of Appeals, Ninth District, on the question of jurisdiction.

(4) Denies that any conflict has arisen on vital questions here involved since this Court decided the case of *Local Loan Co. v. Hunt,* 292 U. S. 234.

(5) Denies the applicability of the cases cited by Petitioner in his recital of "Reasons Relied on for Allowance of the Writ."

In re Skorcz, 67 Fed. (2d) 187. This case like the *Local Loan Co.* case involved a lien on future wages.

After the assignor had filed his petition in bankruptcy, the employer of the assignor filed suit in the Illinois State Court to determine what to do with the wages held under the assignment. Notice of the assignment had been served on the employer. The creditor in that suit claimed the wages under the assignment and the assignor also claimed said wages. Injunctions were then sought by the employer and by the assignor in the United States District Court, and the United States District Court made an order restraining the creditor from any action to collect on his assignment.

From this order the appeal of the assignee arose. The order of the District Court was affirmed.

We submit that the issues in the *Skorcz* case are not in any sense comparable to those in the present case and that the law in the *Skorcz* case decides nothing herein.

Sims v. Jamison, 67 Fed. (2d) 409. This case is likewise not in point. It decides no question here involved on the issue of jurisdiction. It does not determine that the District Court *must* exercise jurisdiction in all cases.

It determines that the Bankruptcy Court *"can and should declare the effect of and enforce state law if it has jurisdiction of a case in which state law is involved."* (P. 410.)

Which is exactly what the Circuit Court of Appeals, Ninth District, did in the *Walters* case. It declared the effect of the decision of the California State Supreme Court in the *Wilson v. Walters* case.

Lowe v. California State Federation of Labor, 189 Fed. 714. This case does not hold that a Federal Court *must* interfere to set aside the decision of a State Court, even where a federal question is indirectly involved.

Holmes v. Rowe, 97 Fed. (2d) 537. This case does not involve the present issues at all and the question of the dischargeability of the debt was never submitted to a State Court by the bankrupt nor decided by a State Court. It was simply held that once the petition in bankruptcy is filed, the Federal Courts retain jurisdiction to pass on an application for an injunction and all other proper matters related to the case. The bankrupt never submitted the question involved to any Court of Appeal but, immediately after the Justice's Court had denied his petition for cancellation of the judgment, he applied to the Bankruptcy Court for an injunction.

Summary of Respondent's Argument.

Respondent's argument will be largely confined to answering the points presented by Petitioner's Brief.

In addition thereto Respondent stands squarely upon the decision of the Ninth District Court of Appeals herein, the text of which is before this Court in the Transcript [R. 132]. All italics are ours.

The following facts and proceedings as disclosed by the Record are basic and, we submit, decisive.

(1) The complaint upon which the claim and judgment here involved is based plainly states a complete cause of action for obtaining money by false representations. This is disclosed by an examination of the pleading itself [R. 28-44]. It is determined by the Supreme Court of California (19 Cal. (2d) 111).

(2) The judgment was by stipulation [R. 44-47].

(3) The judgment was renewed in August, 1937, upon default of the defendant [R. 50].

(4) The Petitioner, *Walters,* was, after adjudication, discharged as a bankrupt in August, 1939 [R. 2]; and the Petitioner listed Respondent's claim in his petition. Respondent did not file her claim nor prove the same in the proceeding.

(5) In May, 1940 [R. 5], Respondent levied garnishment on Petitioner's salary as Municipal Court Judge in Los Angeles under Section 710 of the California Code of Civil Procedure; whereupon the following proceedings and facts followed:

(a) Instead of applying to the Bankruptcy Court for an injunction, Petitoner appeared personally by affidavit in the Superior Court (a State Court) and opposed the garnishment and sought its discharge on three grounds:

First—That his office was a constitutional one and his salary was not, therefore, subject to garnishment.

Second—His discharge in bankruptcy.

Third—That his salary was necessary for the support of his family [R. 65].

(b) The Superior Court granted his petition on the ground that he was a constitutional officer of California and that, as such, his salary was exempt from execution. The Superior Court also decided that the debt upon which garnishment was based was *not discharged in bankruptcy* [R. 65].

(c) Petitioner did not appeal from that decision of the Superior Court nor from that part of the decision which found the debt not to be discharged.

(d) The Respondent appealed from that part of the decision of the Superior Court which invalidated the garnishment on the ground that the judgment debtor was a State constitutional officer [R. 65].

(e) Again, Petitioner did not apply to the Bankruptcy Court for relief but chose to further litigate the issues in the State Courts.

(f) The State Appellate Court affirmed the Superior Court's decision on the ground that Petitioner was a constitutional officer of the State and that his salary for that reason was not subject to garnishment [R. 65].

(g) The Respondent sought a hearing in the State Supreme Court.

(h) Again the Petitioner did not apply to the Bankruptcy Court for relief and in December, 1941, the State Supreme Court reversed the Appellate Court's decision and also decided the other question raised by the Bankrupt's Petition on the garnishment proceeding in the Superior Court from which the appeal arose [R. 65].

(i) Thereafter, Petitioner filed his petition for an injunction and to have the dischargeability of the debt herein determined, on December 23, 1941 [R. 3].

Pertinent Questions Bearing Upon the Record.

(1) Why did the Petitioner not seek injunction relief against the garnishment in the first instance?

There are several reasons which might have justified his course then as well as later—until the State Supreme Court rendered its decision. For instance:

He had three grounds to speculate with in the Superior Court in the garnishment proceeding, namely—

(a) He might get a decision of the Superior Court that the debt *was discharged* in bankruptcy.

(b) He might get a decision by that Court that as a State constitutional officer his salary was not subject to garnishment.

(c) He might get a decision that all of his salary was necessary for the use of his family.

(d) He might get all of these favorable decisions or part of them.

Whereas, if he went into the United States District Court he would have only one of these claims; namely, the dischargeability of the debt, to speculate on.

(2) If the debt was discharged by Bankruptcy, the assertion of all other grounds became unnecessary. Therefore, why did he follow the appeal through the State Courts which he now says was on the single constitutional question, all of which would have been unnecessary if, as he contends, the debt were discharged in bankruptcy? A simple proceeding in the Bankruptcy Court for injunctive relief would have sufficed *if the debt were discharged.*

(3) Can Petitioner defend against Respondent's garnishment on the three specific grounds and then claim that the one that is decided against him is *dictum*?

Argument.

Petitioner's argument is summarized on pages 33 to 35 of his Brief.

We shall follow his points in the order in which they appear in his Brief.

I.

Petitioner's first point involves the question, "Does the District Court have jurisdiction to consider Bankrupt's petition filed in the Bankruptcy Court?"

What relief did the Petitioner seek by that petition?

He sought two forms of relief:

(a) An injunction against any attempt on the part of *Mrs. Wilson* to collect her judgment [R. 3].

(b) An order determining the dischargeability of the debt of the Petitioner to *Mrs. Wilson* [R. 3].

The Referee *did* exercise the jurisdiction of the Bankruptcy Court and *denied the injunction* [R. 97-99].

The United States District Court affirmed that decision by the Referee on Petitioner's Petition for Hearing on the Referee's Certificate on Review [R. 105], but vacated the Referee's Findings.

The United States Circuit Court of Appeals, Ninth District, affirmed the action of the District Court but reversed the District Court's order Vacating the Findings [R. 133-135].

Several far-reaching developments appear from an analysis of this proceeding bearing upon the Bankrupty Court's refusal to exercise jurisdiction.

First:

The Petitioner's Brief misses the issue raised by all of the tribunals which have passed upon it from the Referee to the Circuit Court of Appeals.

The question *never was:*

"Does the United States District Court have jurisdiction to pass upon the question involved?"

The only question discussed by any of the tribunals after *the Referee decided that the Court did have jurisdiction,* was:

"Should the Court exercise its jurisdiction?" [R. 69].

None of the opinions or orders herein attempted to hold that the Court *had no jurisdiction.*

The Referee, as stated above, declared in so many words that the Court *has jurisdiction* [R. 69].

The United States District Court affirmed the Referee's decision in that regard [R. 104].

Therefore, we shall not attempt to argue the question: "Did the Court have jurisdiction?"

Second:

The next fact that appears from an analysis of these proceedings is that the Bankruptcy Court by its decision, based on its Findings, to all intents and purposes accomplished all that a declaratory order could have accomplished.

It denied the injunction.

Of what purpose could an order declaring the debt nondischargeable be, in the fact of the denial of the injunction?

Could the Court declare the debt *dischargeable* and at the same time *deny* the injunction? Manifestly not.

Therefore, the denial of the injunction was the legal equivalent of a declaration that the debt was non-dischargeable.

Why did the Referee, affirmed on appeal, deny the injunction?

Because the Supreme Court of California had declared the debt non-dischargeable?

Not at all.

The California Supreme Court case of *Wilson v. Walters* (19 Cal. (2d) 111) was not so construed by either the Referee or the United States District Court on review. The Referee's opinion is found on pages 61-79 of the Record.

The United States District Court in its order sustaining the Referee says:

> "While on a question of substantive law we might substitute our judgment for that of a State Court, the determination that the judgment here involved was one in tort turns upon a question of California pleading. And the decision of the Supreme Court of California on the subject (*Wilson v. Walters*, 1941, 19C (2) 111) should be accepted as binding on the Bankruptcy Court." [R. 104-105.]

The decision of the Supreme Court of California was considered by the United States District Court only in so far as it passed on the question of pleading, that is, whether the action was in tort or contract and whether the complaint stated a cause of action for obtaining money by false representations.

It held that the complaint stated a cause of action in tort and that it stated a complete cause of action on obtaining money by false representations.

The Referee's reason for declining to exercise jurisdiction becomes apparent from an examination of these proceedings.

The Referee's decision was not based upon a decision by a state court that the debt is non-dischargeable, but rather because the Supreme Court of California had declared *finally* that the complaint upon which the *judgment by stipulation* was based stated a complete cause of action in tort and for obtaining money by false representations; the Referee's decision took cognizance of the provision of the Bankruptcy Act that such a debt was not dischargeable.

If the Supreme Court of California was right in holding that the debt was one for obtaining money by false representations, then, automatically, the Bankruptcy Act renders the debt non-dischargeable (Bankruptcy Act, Sec. 17, Subd. 2).

The Bankruptcy Court by its refusal to exercise jurisdiction decided that the California Supreme Court was right in its decision.

Exercise of jurisdiction to declare the debt dischargeable or non-dischargeable thereby became unnecessary.

Moreover, had the Referee or the United States District Court undertaken to hold the debt dischargeable, such action would have been equivalent to a decision that the Supreme Court of California was without authority or qualification to pass upon the nature and sufficiency of its own California pleadings and causes of action.

Third:

The Petitioner herein demands an order declaring the dischargeability of the debt.

The Referee declined to so order.

What did the Referee do in that regard?

He made Findings of Fact which, among other matters covered, found as follows:

(1) That the debt was one for obtaining money by false representations [R. 89].

(2) That the debt is not dischargeable in bankruptcy [R. 89].

He made a Conclusion of Law that the debt is not dischargeable in bankruptcy [R. 90].

Upon petition for review before the United States District Court, which petition was filed by Petitioner herein, that Court affirmed the decision of the Referee excepting that the Court vacated the Findings of Fact [R. 105]. The order was in two parts: (a) The Referee's order denying the injunction was affirmed [R. 104]; (b) "The order, in all other respects, and the findings of fact are reversed" [R. 104].

The latter section of this order had the effect of neutralizing the findings on the charge of obtaining money by false representations and the non-dischargeability of the debt.

Then follows Petitioner's Notice of Appeal in which he appeals from the said order "Vacating and Setting aside the Referee's Findings of Fact and dismissing Bankrupt's Petition" [R. 114-115]. He could have appealed from the order in so far as it dismissed the Bankrupt's

petition for an injunction, leaving the order Vacating the Findings standing (Rule 73 United States District Court). But he did not do so.

He appealed from the order in its entirety.

The United States Circuit Court of Appeals. in its decision, reinstated the Findings of Fact, thereby sustaining Petitioner's appeal in that regard [R. 134-135].

Can Petitioner now claim that the Referee erred in refusing to exercise jurisdiction in declaring the dischargeability of the debt—when by his own voluntary act he, the Petitioner, has established and successfully litigated Findings of Fact which declare the debt non-dischargeable and which declare it to be one for obtaining money by false representations? (5 C. J. S. 222; 5 C. J. S. 227, Sec. 1514.)

> "As a general rule any voluntary act or course of conduct on the part of a party, with knowledge of the facts, by which he expressly or impliedly recognizes the validity of a judgment, order, or decree against him operates as a waiver of his right to appeal therefrom or to bring error to reverse it, as where he obtains affirmative relief under the judgment. The general rule applies, however, only where the acts relied upon as a waiver are such as clearly show a recognition of the judgment, order, or decree as valid." (4 C. J. S. 403.)

> "It is a well settled general rule, declared in some states by express statutory provision, that a party is not aggrieved by a judgment, order, decree, or ruling regularly rendered or made, on agreement or otherwise, with his express or implied consent, and therefore he cannot appeal or sue out a writ of error to review the same, even though there has been an

attempt to reserve the right to appeal, and even though the consent order was not authorized by the pleadings. Under this general rule, a party generally is estopped or waives right to appeal or bring error where a judgment, order, or decree was entered on his motion, offer, or admission or at his request." (4 C. J. S. 404-405.)

Petitioner is also bound by the same decision of the United States Circuit Court of Appeals on the ground of Election of Remedies. (28 C. J. S. 1077-1080.)

Arguing Petitioner's first point we now come to his authorities.

He cites and quotes *Local Loan Co. v. Hunt,* 292 U. S. 234, at length.

He fails by this case to show that the District Court should have exercised jurisdiction to decree the dischargeability of the debt in our *Walters* case.

The *Local Loan Co. v. Hunt* case opens as follows:

"On September 17, 1930, respondent borrowed from petitioner the sum of $300, and as security for its payment executed an assignment of a portion of his wages thereafter to be earned. On March 3, 1931, respondent filed a voluntary petition in bankruptcy in a federal district court in Illinois, including in his schedule of liabilities the foregoing loan, which constituted a provable claim against the estate. Respondent was adjudicated a bankrupt; and, on October 10, 1932, an order was entered discharging him from all provable debts and claims. On October 18, 1932, petitioner brought an action in the municipal court of Chicago against respondent's employer to enforce the assignment in respect of wages

earned after the adjudication. Thereupon, respondent commenced this proceeding in the court which had adjudicated his bankruptcy and ordered his discharge, praying that petitioner be enjoined from further prosecuting said action or attempting to enforce its claim therein made against respondent under the wage assignment. The bankruptcy court, upon consideration, entered a decree in accordance with the prayer; and this decree on appeal was affirmed by the court below (67 F. (2d) 998), following its decision in Re Skorcz (C. C. A. 7th) 67 F. (2d) 187.

"Challenging this decree, petitioner contends: That the bankruptcy court was without jurisdiction to entertain a proceeding to enjoin the prosecution of the action in the municipal court; that, assuming such jurisdiction, the rule is that an assignment of future wages constitutes an enforceable lien; but that, in any event, the highest court of the State of Illinois has so decided, and by that decision this court is bound." (93 A. L. R. 197-198.)

The foregoing case is neither applicable to our case from the standpoint of the issues involved nor in its determination.

The distinctions between the two cases are extremely well defined. In particular they are as follows:

(1) There was no judgment against Hunt in favor of Local Loan Co. when Hunt filed in bankruptcy on March 3, 1931. The Municipal Court case was filed after Hunt was adjudicated a bankrupt.

In the *Walters* case, the Wilson judgment was seven years old when Walters filed in bankruptcy in 1939 and had been once renewed by default.

(2) The suit in the Chicago Municipal Court brought by the Local Loan Co. was against Hunt's employer, not Hunt. Hunt was not a party nor did he intervene.

The *Walters* original suit in the California Superior Court was between *Wilson and Walters* [R. 28] and the later proceeding that went to the State Supreme Court of California on appeal was between Wilson and Walters. (19 Cal. (2d) 111.)

(3) The decision relied upon by Local Loan Co. in its appeal from the order for injunction issued by the Federal Court was a Supreme Court decision of the State of Illinois in the case of *Mallin v. Wenham,* 209 Ill. 252. None of the parties of the *Local Loan Co.* case were parties to that suit. The *Mallin* case was mere precedent at best. It was in no sense *res adjudicata.* It did not decide a single issue between the parties in the *Local Loan Co.* case. The Federal Court was not *bound* by that decision more than any Federal Court is bound by precedent in a state court.

In the *Walters* case *the very issue between the same parties,* and the main issue involved in this appeal was adjudicated first by *stipulation* of those parties in the Superior Court of Los Angeles County [R. 44] and in the later proceeding in the same court which was finally determined in favor of Wilson in the State Supreme Court. *(Wilson v. Walters, supra.)*

(4) In the *Local Loan Co.* case the action commenced in the Chicago Municipal Court, was enjoined *before* it reached judgment, and no final decision of the issues therein was ever rendered outside of the Federal Court.

In the *Walters* case, both cases in the California courts had become final, one by stipulation and the other by default, before Walters resorted to the Federal Court for relief against Wilson's claim after his adjudication in bankruptcy. And, prior to his petition for injunction the California State Supreme Court decision in the *Wilson v. Walters Case (Supra)* had likewise become final on the question here involved.

(5) In the *Local Loan Co.* case, the bankrupt Hunt *first appeared in the Federal Court* in his action to enjoin the foreclosure of the "lien" of the Local Loan Co. upon his future wages.

In the *Walters* case we find two very sharp and significant contrasts on this point from the *Local Loan Co.* case, namely:

(a) When Walters filed in bankruptcy, he had twice agreed to judgment on the Wilson claim. The first time by stipulation and the second time when the judgment was renewed.

(b) Before *Walters* started his proceeding in the Federal Court to enjoin the enforcement of the Wilson judgment and for a decree declaring the judgment dischargeable, the third state court order had become final by the decision of the California State Supreme Court.

Thus Walters *had three times voluntarliy submitted the issues* of Mrs. Wilson's claim to the state courts where they had been decided against him, before he appealed to the Federal Court for injunction or declaratory relief without once resorting to the Federal Courts for relief.

Walters himself raised the issue of his bankruptcy and the question of false representations involved therein in

the proceeding which was finally determined by the California State Supreme Court.

Walters could have started his proceeding in the Federal Court while the State proceeding was pending, to enjoin it, but he did not do so. He chose to submit the issue to the State court for its final determination.

In the *Local Loan Co.* case we find this significant language:

> "So far as appears, the municipal court was competent to deal with the case. It is true that respondent was not a party to that litigation; but undoubtedly it was open to him to intervene and submit to that court the question as to the effect upon the subject matter of the action of the bankruptcy decrees. And it may be conceded that the municipal court was authorized in the law action to afford relief the equivalent of that which respondent now seeks in equity. Nevertheless, other considerations aside, it is clear that the legal remedy thus afforded would be inadequate to meet the requirements of justice. As will be shown in a moment, the sole question at issue is one which the highest court of the State of Illinois had already resolved against respondent's contention. The alternative of invoking the equitable jurisdiction of the bankruptcy court was for respondent to pursue an obviously long and expensive course of litigation, beginning with an intervention in a municipal court and followed by successive appeals through the state intermediate and ultimate courts of appeal, before reaching a court whose judgment upon the merits of the question had not been predetermined. The amount in suit is small, and, as pointed out by Judge Parker in Seaboard Small Loan Corp v. Ottinger, *supra* (50 F. (2d) at p. 859, 77 A. L.

> R. 956, 18 Am. Bankr. Rep. (N. S.) 500) such a remedy is entirely inadequate because of the wholly disproportionate trouble, embarrassment, expense, and possible loss of employment which it involves."

Walters *chose* the "obviously long and expensive course of litigation." *(Local Loan Co. v. Hunt.)*

(6) In the *Local Loan Co.* case the amount involved was "small, as pointed out by Judge Parker," the amount involved being only $300.00.

In the *Walters* case, the amount involved at the time Walters filed his proceeding in the Federal Court was $8,858.75 with interest at 7% from August 20, 1937 [R. 50].

(7) In the *Local Loan Co.* case the court used this language:

> "What has now been said establishes the authority of the bankruptcy court to entertain the present proceeding, determine the effect of the adjudication and order, and enjoin petitioner from its threatened interference therewith. It does not follow, however, that the court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist." (93 A. L. R. 199.)

This surely is decisive on the point that the Federal Court *was not bound* to exercise its jurisdiction. It "would not and should not" have done so but for the "unusual" circumstances.

(8) *Unusual Circumstances.*

In the *Local Loan Co.* case there were present "unusual circumstances" which, according to the Court's opinion, justified its intervention and without which it "should not and would not" have intervened.

The Court does not state directly what these "unusual circumstances" were. But the events and proceedings recited in the opinion while discussing that phase of the case show clearly what the Court had in mind.

In our distinction between the *Local Loan Co.* case and the *Walters* case we have pointed out the wide difference between the facts of the two cases. Our analysis, we submit, shows the unusual nature of the *Local Loan Co.* case and, wherein the *Walters* case was not unusual as compared to the *Local Loan Co.* case.

In substance, the Court in the *Local Loan Co.* case says:

While Hunt was not a party to the Municipal Court case, he could have intervened. Had he done so, such proceeding would have been inadequate for several reasons:

(1) It would have involved a long and expensive proceeding through State courts.

(2) There was a State Supreme Court decision in another case already determining the point in issue adversely to him.

(3) The amount involved was too small, "and as pointed out by Judge Parker in Seaboard Small Loan Corp v. Ottinger (50 F. (2d) 859), such a remedy is entirely inadequate because of the wholly disproportionate trouble, embarrassment, expense and possible loss of employment which it involves." *(Local Loan Co. v. Hunt, supra.)*

The case was unusual in the three respects just noted. It was, as mentioned under the second notation just above, unusual because of the unsettled state of the law on the subject involved.

The Illinois decision in *Mallin v. Wenham*, 209 Ill. 252, alluded to by the court, and upon which the Municipal Court based its erroneous decision, together with a few other cases on the same question, was against "the greater weight of authority" according to the court.

The question was one of substantive law, not of pleading.

> "When a person assigns future wages, he, in effect, pledges his future earning power. The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much if not more than it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern." (93 A. L. R. 201-202.)

The Petitioner in our *Walters* case admits that the *Mallin v. Wenham* case was erroneous. (Petitioner's Brief p. 55.)

But in the California Supreme Court case of *Wilson v. Walters,* we have a positive decision on a fundamental question of Pleading, which, so far as this proceeding is concerned settles this important issue:

Did the original complaint, upon which the basic judgment was taken by stipulation, state a cause of action for obtaining money by false representations as that charge is defined by California law?

The Municipal Court decision in the *Local Loan Co.* case, controlled as it was by the *Mallin v. Wenham* case, created an unusual circumstance for the Supreme Court's consideration in the *Local Loan Co.* case, because of the unsettled state of the law.

There is nothing unsettled in the law as determined by the California Supreme Court in the *Walters* case, excepting that Petitioner objects to it.

Wherein was the *Walters* case "unusual" measured by the "yardstick" of the *Local Loan Co.* case?

If it was unusual at all, its unusual nature consists of the following:

(a) The fact that after stipulating to a judgment based on a complaint for obtaining money by fraudulent representations, in August 1932 [R. 47], and after the entry of a judgment (renewing the first judgment) by default in August, 1937, after almost seven years, he filed in bankruptcy on June 9, 1939;

(b) That after Mrs. Wilson levied garnishment on his salary as Municipal Court Judge in May, 1940, he did not attempt to enjoin her through any appeal to the Bankruptcy Court but, rather, resisted her proceeding in the State Court and continued to

so resist it in the State Courts until after December 2, 1941, when the matter was finally adjudicated by the Supreme Court of California. *(Wilson v. Walters,* 19 Cal. (2d) 111, *supra.)*

(c) That after these three state decisions against him, for the first time he started a direct attack in the Federal Courts against this judgment. (He had listed it in his voluntary Petition in Bankruptcy.)

(d) That this judgment now amounts to in excess of $12,000.00 including interest from August 27, 1937 [R. 50]. That no payments have been made on the principal of the judgment at all and almost nothing to affect the mounting interest. [The record does not show any payments at all—R. 26.]

Where is there any indication of harrassment in the record excepting the bankrupt's statement in his petition [R. 3-8] which the respondent *Mrs. Wilson* denied [R. 18-27]?

He states that he is a Municipal Court Judge [R. 7].

That his salary is necessary for the support of his family [R. 7].

That *Mrs. Wilson's* attempt to collect her judgment is embarassing to him; that it disturbs his work and that the attendant publicity damages him irreparably [R. 8].

We ask, why did he not immediately adopt the short and direct attack upon the *Wilson* judgment by resort to the Federal Courts and not pursue and await the action

of the State Courts thereon, if he was being harassed by Mrs. Wilson or if he was suffering embarrassment? Such a procedure would have been easier on Mrs. Wilson and certainly less expensive to her, not to mention his own interests.

He chose his own course, and the most unusual aspect of his case is the novel artifice by which he attempts to side step the results of his own unusual conduct.

We submit that the *Local Loan Co.* case does not supply any law or reason for the intervention of the United States Supreme Court on the basis of "unusual circumstances" in this case.

Nor do the cases of:

Holmes v. Rowe, supra (9 Cir.);

Davison, Paxon Co. v. Caldwell, supra:

In re Skorcz, supra;

Sims v. Jamison, supra (9 Cir.) (Cited in *Local Loan Co. v. Hunt*);

Seaboard Small Loan v. Ottinger, supra (Cited in *Local Loan Co. v. Hunt*);

In re Swofford Bros. Dry Goods Co., 180 Fed. 549 (Cited in *Local Loan Co. v. Hunt*);

Pell v. McCabe, 256 Fed. 512 (cited in *Local Loan Co. v. Hunt*), cited by the Petitioner on page 55 of his brief furnish anything different or more nearly in point than the *Local Loan Co.* case.

EFFECT OF CALIFORNIA SUPREME COURT DECISION IN THE WILSON V. WALTERS CASE UPON THE BANKRUPTCY COURT.

This question was raised on page 56 of Petitioner's Brief.

Here again Petitioner appears to think that we question the Bankruptcy Court's jurisdiction to determine the dischargeability of the debt in this case.

The cases cited by Petitioner under this head are far afield and not applicable to the present issues or facts.

He mentions the *Davison-Paxon Co. v. Caldwell* case (113 Fed. (2d) 189) and quotes from it. (Pages 62, 63 and 64 of his Brief.)

In his quotations from this case, Walters very carefully avoids *the one deciding* factor that prompted the Federal Court in its reversal of the Georgia State Court.

The Federal Court held that notwithstanding the sufficiency of the complaint to state a cause of action on the ground of fraud *which is dischargeable* (unless by a public official), *it lacked one very essential element* to state a cause of action on the ground of false representations, namely, *the allegation that there were any false representations made.*

And, because the complaint lacked that very essential allegation, the Federal Court reversed the Georgia State Court.

Moreover, in the *Davison-Paxon* case we again find present some distinct contrasts with the *Walters* case.

The bankrupt, when the creditor attempted to levy execution, immediately petitioned the Federal Court for an

injunction. He did not at any time agree to the judgment in the Georgia State Court. It was not by his stipulation nor upon his default.

But there is another distinguishing feature about the *Davison-Paxon* case. It does not rule upon the question of jurisdiction at all.

It does not hold that the Federal Court is *bound* to *exercise its jurisdiction* to overrule the Georgia State Court. So far as the *Davison-Paxon* case shows, the action of the Federal Court was purely discretionary.

But, there was present in that case an unusual circumstance—namely, the *failure of the basic complaint to allege a cause of action at all,* upon the ground of *false representation.*

As we shall later show, the complaint in the *Walters* case was "complete" as stating a cause of action for false representations sufficient to satisfy the requirements of the Bankruptcy Act.

Walters, in his brief, cites the case of *In re Skorcz,* 67 Fed. (2d) 187, which only holds that the Bankruptcy Court has *power* to enjoin when future wages of the bankrupt are involved under a lien.

Petitioner cites *Hobbs v. Franklin Jewelry Co. Inc.,* 131 Fed. (2d) 432, several times. Had he followed this case through he would have found that it clearly supports Respondent's theory and is not in the category of cases which would justify the exercise of jurisdiction by the District Court herein.

Lowe v. California Federation of Labor, 189 Fed. 714, cited by Petitioner on page 59 of his Brief. A portion of this case is, we submit, good law but does not assist in

the present controversy. The Petitioner overlooks "excepting so far as affected by local statutes," in this case.

John Deere Plow Co. v. McDavid, 137 Fed. 802. This case involved a "rule of preference and equity." But the Petitioner is asking the Federal Courts to reverse a State Supreme Court's decision on a question of pleading.

Reynolds v. N. Y. Trust Co., 188 Fed. 611. Here the Court was called upon to distinguish between firm and individual liability upon waiver of tort.

> "The bankruptcy court recognizes a distinction between firm and individual debts" (p. 619).
>
> "The bankruptcy statute gives priority of rights in assets to creditors according to whether the debts are partnership or individual" (p. 618).

This Court held that the Bankruptcy Court in the exercise of its jurisdiction has the right to determine whether an obligation on a contract arises upon a conversion of goods, available to the owner when he waives his remedy in tort (based upon the common law) and is not *controlled* by the decision of State Courts in that regard.

The principal question was—did the creditor have the right to waive the tort and sue in contract, regardless of whether the debtor had sold the goods or "kept, consumed or concealed them?"

Clark v. Rogers, 183 Fed. 518. We cannot find, in this case, anything to support Petitioner. The principal point instead, in this case, was, "Do a defaulting trustee and his co-trustee *(cestui que trust)* stand in the relation of debtor and creditor?" (P. 525.) The question concerned

the right of such a debt to preference under the bankruptcy laws and the distinction between the trustee's individual and his trust capacity.

It was held that Bankruptcy Courts had the right to construe "upon a contract express or implied" to include *quasi* contracts.

We fail to find anything in this case to hold that Federal Courts may not recognize the decision of a State Court passing upon a question of pleading in a State Court.

Harrison v. Foley, 206 Fed. 57.

This case discussed the "law of the case"—which is plainly not involved in the *Walters* case since "Law of the case" only applies between successive actions in the same Court.

But *Walters* stopped too soon in his reading from this case. Here Mrs. Foley sued Harrison, administrator for Melby, deceased, in a State Court of Missouri, to recover contents of a safety deposit box, claiming they were given her by Melby anticipating death. Verdict was in her favor. It was vacated, and on appeal, the order was affirmed and a new trial ordered. Before the new trial, she dismissed without prejudice and sued in the Federal Court where she was awarded the verdict. Harrison prosecuted writ of error.

The Federal Court held that since the verdict in the State of Missouri had been vacated by the Supreme Court,

> "There was no judgment in the State Courts which could be pleaded as *res adjudicata* nor was the de-

cision of the State Supreme Court a construction of a local statute or the establishment of a local rule of property" (p. 59).

In re Plotke, 104 Fed. 964.

Not in point. The validity of the assignment was "not questioned under the state statutes."

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.

This case involved action by a widow before the State Industrial Commission for relief on account of death of her husband as an employee of Knickerbocker Ice Co. where he was a bargeman. It was held that the Industrial Commission had no jurisdiction even though compensation insurance was involved because the employment of the deceased was a maritime matter and, *under the Constitution* of the United States, Federal Courts had exclusive jurisdiction of all matters of a maritime nature.

(Justice Holmes dissented.)

We shall show hereafter that the bankruptcy statutes are not so limited.

In re Pacific Alloy Steel Co., 299 Fed. 952.

In this case the Pacific Alloy Steel Co. went into bankruptcy while owing a power bill to Great Western Power Co. of California. The latter company attempted to divest the Bankruptcy Court of jurisdiction on the ground that the alleged bankrupt had forfeited its State Charter and had no corporate rights to file in bankruptcy.

There is no similarity between the two cases nor in the issues decided.

San Francisco Shopping News Co. v. City of San Francisco, 69 Fed. (2d) 879.

This case involved the construction of a city ordinance prohibiting the local distribution of hand bills, etc., from house to house. The question was—does the ordinance violate the 14th Amendment to the Constitution.

This case, like the others cited by appellant, is far afield as to the facts and issues.

But the Court determines that "the (Federal) Court will accept as correct the interpretation which has been placed upon such (State) statute by the State Court."

Crescent Live Stock v. Butchers Union, 120 U. S. 141.

Here there was a series of cases involving different parties, and the U. S. Supreme Court in the final case was discussing the value and effect of precedent between State and Federal Courts, nothing more.

In the *Walters* case, we have a vastly different situation where *res adjudicata* is the issue, between the *same parties* and involving a judgment by stipulation and consent.

Cases and Argument in Opposition to Petitioner's Point 1-C.

Respondent now presents her authorities to show that Federal Courts may and do regard decisions of State Supreme Courts on the questions involved in the *Walters* proceeding as *res adjudicata* and binding.

Federal Courts likewise recognize and regard as binding, decisions of State Supreme Courts which adjudicate the sufficiency of pleadings in State Courts.

In the *Walters* case, it was decided by the State Supreme Court that the basic complaint was sufficient to

state a cause of action; that the plaintiff did not waive the tort; that fraud and obtaining money by false representations was sufficiently pleaded.

And judgment was by stipulation "in accordance with the allegations of the complaint."

With the foregoing in mind we submit the following:

> "The rule as to the conclusiveness of an adjudication where the same matter again comes up between the same parties is too familiar to require much restatement. It adjudicates questions of both law and fact upon which their rights depend, and those which might have been determined as well as those which were."
>
> *Handlaw v. Walker,* 200 Fed. 566-(568).

Where a suit in a State Court was based on the construction of a contract by which claimant claimed the right to an undivided half of certain property purchased for a city waterworks system, and judgment was *res adjudicata* of an issue as to whether complainant's right under the contract was to an undivided one-half (½) of the property itself or only to an interest in the profits derived therefrom (involved in a suit in the Federal Court).

Swift v. McFarland, 215 Fed. 452.

Defendants in a suit in the Federal Court, are concluded by a decision in complainant's prior suit in a State Court to which they were all parties, as to the question there decided.

Belts v. Great Western Lead Mfg. Co., 251 Fed. 696.

"The adjudication in a State Court of a question directly in issue between the parties is conclusive between the same parties suing in a Federal Court, as to that issue."

Grizzi v. Delaware & H. Co., 266 Fed. 513.

There can be no exception to this rule under judgments after trial upon the merits.

The case of *Detroit Trust Co. v. Schwartz,* 16 Fed. (2d) 943, held that a trustee in bankruptcy is bound by the decree of a State Court adjudging that the bankrupt did not own the property claimed (in U. S. District Court proceeding) to have been preferentially and fraudulently transferred, *in the absence of a showing that the decree was procured by fraud.*

"A judgment is *res adjudicata* as to whether or not a liabiilty is for 'willful and malicious injury to person or property' and a State court's ruling on the nature of the liability will be adopted."

Remington on Bankruptcy, Sec. 3553, Vol. 7 p. 821.

"Conversion of funds is established by the decision of a State Court sufficient to bar a discharge in bankruptcy where defendant was originally sued on contract by the creditor and when, after defendant's departure from the state, the cause of action was charged to tort by general allegations admittedly to avoid the discharge in bankruptcy."

Young v. City Bank, 223 S. W. (Tex.) 340.

In *In re Ruchkonski,* 39 Fed. (2d) 969, the question involved a chattel mortgage allegedly given to defraud creditors (which would seem to be a matter directly for the Bankruptcy Court to decide). The State Court of Minnesota affirmed that decision. (177 Minn. 84.) The case came to the Federal Court which held:

> "The bankrupt now contends that the judgment in the State Court does not justify the finding or recommendation of the Special Master because the same rule of evidence does not apply in this court on the application for discharge and the objections thereto, as prevailed in the State Court; that the Special Master was therefor required to retry the question as to whether the Chattel Mortgage was in fact given to defraud creditors * * *
>
> "The question as to whether Chattel Mortgages are fraudulent or otherwise is determined by the laws of the state where they are made. (Numerous citations.)
>
> "The general rule is, as stated by the Special Master in his findings, that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment on the first suit remains unmodified." (Citations.)

Again, we have this from the case of *U. S. v. Sakharaw Ganesh Pandet,* 15 Fed. (2d) 285. The State Court having jurisdiction, the judgment of that Court upon *federal*

questions is *res adjudicata.* (*Mitchell v. First National Bank,* 180 U. S. 471.) The answer raises a right and immunity under the "Commerce Clause" of the Constitution. The identical issue was before the State Court by Petitioner's invitation on petition for review, and that question was considered by the State Court and decided against the Petitioner, and the decision may not be reviewed or revised by this Court. (*Boston v. McGovern,* 292 Fed. 705.) The transportation was of a local nature —Columbia to Bellingham. The issue was decided and the parties are bound by the decree. * * *

> "The foundation of the doctrine of *res adjudicata* or estoppel by judgment, is that both parties have had their day in court. The general principle was clearly expressed by Mr. Justice Harlow speaking for this court in *So. Pac. R. Co. v. U. S.,* 168 U. S. 148. 'That a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdicition as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies.'"
>
> *U. S. v. Sakharaw Ganesh Pandet,* 15 Fed. (2d).

> "C. C. A. Ark. Neither the District Court nor the Circuit Court of Appeals can by way of review or otherwise allow relitigation of issues that were tried and determined in State court."
>
> *Missouri Pac. Transp. Co. v. Priest,* 117 F. (2d) 32.

> "C. C. A. Utah. Where State Supreme Court reversed trial court and held that a debtor had forfeited his rights in property by failing to make payments due, and that creditor was entitled to possession of

property, and entered its judgment to such effect and issued its mandate directing trial court to enter such a judgment, decision of State Supreme Court was a conclusive determination of the controversy."

Bastian v. Erickson, 114 F. (2d) 338.

"A State court's judgment may not be reviewed by bill in equity in a Federal court."

Chirillo v. Lehman, 38 F. Supp. 65, affirmed 61 S. Ct. 741, 312 U. S. 662, 85 L. Ed.

"D. C. N. Y. In action in Federal District Court for Southern District of New York to recover a bank deposit, 'full faith and credit' was required to be given to New York attachment proceedings in which warrants of attachment had been levied against the deposit."

28 *U. S. C. A.,* Sec. 687;

Steingut v. National City Bank of New York, 38 F. Supp. 451.

"D. C. Wis. Where the material fact issues raised by the pleadings in action on life policy before the Federal District Court were tried to a jury in an action on a similar life policy in a Wisconsin circuit court which determined the issues in favor of plaintiff and against defendant, and the Wisconsin Supreme Court affirmed the circuit court's judgment, that judgment was *res adjudicata* on the material issues raised by the pleadings in the case before the Federal District Court."

Tully v. Prudential Ins. Co. of America, 33 F. Supp. 680.

The other cases cited by Petitioner under this same head are equally inapplicable.

When is a litigant entitled to equitable relief from a judgment?

> "To entitle a litigant to equitable relief from a judgment which would otherwise be *res adjudicata*, it must appear that an injustice has been done and that the judgment assailed is inequitable and that it is against equity and good conscience to enforce it. *But a judgment* that is in no way tainted by fraud or misrepresentation in its *procurement is not unjust and inequitable.*"
>
> *Mo. Pac. Transport Co. v. Priest*, 117 Fed. (2d) 32.

There is no showing nor charge in Petitioner's case that there was any fraud exercised or attempted in the procuring of the *judgment* by Respondent.

IS THE CALIFORNIA SUPREME COURT DECISION IN THE WILSON V. WALTERS CASE DICTUM AS TO THE EFFECT OF THE DISCHARGE IN BANKRUPTCY?

Petitioner argues that it is (Petitioner's Br. p. 70).

He quotes the Appellate Court's decision from which Respondent appealed on a petition for hearing before the Supreme Court, which stated: "This is the sole question necessary for us to determine: Is a Judge of the Municipal Court of the City of Los Angeles a Constitutional Officer of the State of California?" (*Wilson v. Walters*, 112 Pac. (2d) 964.)

He does not quote from the recital in *Wilson v. Walters,* 19 Cal. (2d) 111, in the Supreme Court, which contains the following:

> "On May 31, 1940, defendant filed a notice of motion for an order releasing the money so held by the Superior Court, which motion was based upon three grounds, namely, that defendant's salary as a Municipal Court Judge was not subject to garnishment; that defendant had been discharged in bankruptcy; and that the salary was exempt from execution under section 690.11 of the Code of Civil Procedure because it was earned within the period of thirty days next preceding the filing of the abstract of judgment with the county auditor. The court made its order granting the motion, stating therein: '. . . defendant's discharge in bankruptcy does not release the claim of plaintiff's judgment herein. The motion of defendant to release the balance of money under garnishment is granted upon the sole ground that defendant is . . . a judge of the Municipal Court . . .'"

This definitely shows the Supreme Court to have full authority to pass upon the *three grounds* upon which the defendant Walters sought to defeat Mrs. Wilson's attempt to garnishee his salary, one of which was his alleged Discharge in Bankruptcy. Our reasoning follows:

Respondent levied garnishment on Petitioner's salary as Municipal Court Judge by a proceeding in the Superior Court under Section 710 of the California Code of Civil Procedure (R. 64-65).

This garnishment was levied under Respondent's judgment secured on August 17, 1932, and renewed August 20, 1937.

Petitioner opposed Respondent's proceeding with a motion to release his salary so levied upon, and based his motion on three grounds:

(1) That his salary as a Municipal Court Judge was not subject to garnishment.

(2) That he had been discharged in bankruptcy; and

(3) That his salary was exempt from execution because it was earned within thirty days from the filing of the Abstract of Judgment [R. 65].

The Superior Court ruled that Respondent's said judgment had not been discharged in bankruptcy and that his salary could not be levied upon because he was a constitutional officer of the State of California (R. 65).

Petitioner now argues:

"The trial court undertook to state as a matter of pure *dictum* that the discharge in bankruptcy was not a release. The order being in favor of the bankrupt, it was wholly unnecessary to rule upon the bankruptcy issue. Bankrupt was not aggrieved and therefore did not appeal from the dictum." (Petitioner's Br. 70.)

The trial court's decision on the bankruptcy matter was not *dictum*.

If it is to be construed as *dictum*, then for that specific reason, in addition to others, the Supreme Court's decision is ***not dictum.***

If the Superior Court's decision on the bankruptcy issue was, as Respondent contends, undecided when the matter came to the State Supreme Court, then for that very reason the Supreme Court had full authority to determine it.

By the nature of the proceeding it had to go back to the Superior Court after the Supreme Court's decision for determination of the *amount* to be covered by the garnishment.

If the matter of the discharge in bankruptcy and its effect upon the judgment were undetermined, what would prevent Petitioner from *again claiming that the debt was discharged,* when the Superior Court took up Respondent's garnishment for consideration in keeping with the State Supreme Court's decision?

It is a rule that is supported by a mass of decisions in California that the Supreme Court may determine every question and issue raised by the pleadings, particularly when the same question or issue might be raised at a future time if left undecided.

> "The Supreme Court, and the District Courts of Appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. The decision of the court shall be given in writing, and in giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appeal cases shall be remitted to the court from which the appeal was taken." (C. C. P. Sec. 53.)
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> 2 *Cal. Jur.* 802-803;
>
> *Weisser v. So. Pac. Ry. Co.,* 148 Cal. 426;
>
> *Westerfield v. New York Life Insurance Co.,* 157 Cal. 339;
>
> *Bradford Investment Co. v. Joost,* 117 Cal. 204;
>
> *Cabe v. City of Los Angeles,* 164 Cal. 705.

Respondent's garnishment proceeding was a special one which might arise repeatedly and to leave unsettled the *bankruptcy question* which was *raised by the judgment debtor and submitted to the Superior Court by him for decision* would pave the way for future controversy and litigation.

The hearing on the question as to the amount to be allowed Mrs. Wilson by her garnishment, after the case was remitted to the Superior Court, was in the nature of a new trial, and the Supreme Court acted wisely and properly in disposing of the issue.

The fact that the Appellate Court believed it had only one question to determine did not bind the Supreme Court to the consideration of that one question on the hearing in that court.

The record on appeal in the State courts is not a part of the record here.

The statement of the State District Court of Appeal, in its opinion, that the one question to be determined was the one that it decided, is not binding on the Supreme Court.

The contents of the Notice of Appeal and of the Briefs of the litigants in that appeal are unknown to this court. They were not unknown to the State Supreme Court of California.

The decision of the State Supreme Court of California is entitled to the presumption that the bankruptcy matter was an issue on the appeal, made so by the pleadings and briefs.

If this matter is argued orally, we respectfully request the Petitioner to produce at the argument copies of the printed transcript and briefs in the said appeal in the

California Courts, in order that this Court may determine if it so desires,

(a) Whether the discharge in bankruptcy was an issue on that appeal, and

(b) If it was, who raised such issue.

On the other hand, if the decision of the Superior Court on the question of the discharge in bankruptcy was *not dictum*, then it became final by the Petitioner's (*Walters*) failure to appeal from it and in that case it is as binding (being final) as if it were a decision of the State Supreme Court. In which case the question as to whether the decision of the State Supreme Court was or was not *dictum* would be immaterial.

In this connection we point out that the question of the discharge in bankruptcy submitted to the Superior Court as a defense by *Walters* was submitted as a ground for defeating the garnishment and called for a decision of the Superior Court on its merit. Had the Superior Court decided that the debt *was discharged* by *Walters'* bankruptcy, no garnishment nor execution could have issued out of that Court, nor prevail if issued, unless such decision were reversed on appeal.

In closing our argument in this point, we submit a definition for the Court's consideration—a definition of *"dictum"* found in 21 *C. J. S.*, pages 309-316, which indicates that Petitioner has, in his argument, misunderstood the meaning of the word and its function. We submit that the term cannot, under this definition, be applied to the *Wilson v. Walters* decision.

In this connection we note that Petitioner questions the finality of the California Supreme Court's decision in the *Walters* case.

He says "The said case is now pending in the said Superior Court." (Pet. Br. p. 4.)

He says on page 34 of his brief that "The State Supreme Court's decision * * * is not a final judgment."

He repeats this same statement on page 68 of his brief.

A reading of the decision in the State Supreme Court case of *Wilson v. Walters* demonstrates that the decision *was final* on all issues *excepting* "to determine what, if any portion of the defendant's salary as levied upon is exempt under Section 690.11 of the Code of Civil Procedure, and thereupon enter an order directing the disbursement of such portion of the defendant and any balance remaining to plaintiff in partial satisfaction of the judgment against defendant."

Section 690.11 gives Petitioner the right to exemptions of salary where necessary for the support of his family.

II.

Petitioner urges as his second point that the Circuit Court erred by "failing to make any findings of fact upon which to base its order."

Petitioner properly considers The Findings of Fact and Conclusions of Law as made by the Referee re-instated (Pet. Br. p. 74).

What material issues are left undetermined by the Findings of Fact and Conclusions of Law?

Petitioner points to four recitals quoted from his Petion for Injunction in the Bankruptcy Court upon which he claims there should have been Findings.

It is a rule of universal application in practically all of the States, accepted by the Federal Courts, that when findings of fact are made upon all of the material issues of the case, it is unnecessary to find upon immaterial or purely incidental matters.

We submit that every material issue raised by the petition and affidavit in opposition thereto is covered by the Findings of Fact and Conclusions of Law. (See Findings of Fact and Conclusions of Law R. 81-91.)

The fact that Mrs. Wilson did not file her claim in Walters Bankruptcy proceeding before discharge is immaterial. She need not file her claim if it is not dischargeable and the Court found that it was non-dischargeable (R. 89).

The fact that Mrs. Wilson made no objection to Walters' listing of her claim in his schedule is likewise immaterial if the claim was non-dischargeable. The Court found it was non-dischargeable (R. 89).

The fact (if it be a fact) that Mrs. Wilson threatened to enforce her judgment against Walters is immaterial for the same reason, the Court having found the debt to be non-dischargeable. A finding that "such procedure would nullify the decree of this Honorable Court, etc." would be surplusage as pure conclusion of law.

The alleged facts set out in "paragraph VII (R. 7-8)" referred to on page 72 of Petitioner's Brief must be immaterial in view of the Findings of fraud, non-payment, and non-dischargeability of the debt, which are ultimate facts covering all aspects of the case.

A finding of ultimate facts necessarily includes all probation facts together with inferences, deductions, and conclusions therefrom.

64 *C. J.* 1251;

Nashville Interurban Ry. v. Barnum, 212 Fed. 634.

"It has been repeatedly held that if findings are made upon issues which determine a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error. Thus it is not prejudicial error to fail to find upon a cause of action which alleges in another form the cause of action stated in preceding counts and does not add materially to the statement of facts contained in other parts of the complaint upon which findings are made. A failure to find on issues presented by a cross-complaint is immaterial where the facts alleged are not inconsistent with those alleged in the complaint and the findings made necessarily involve a consideration of the claim in the cross-complaint. So also where the matters alleged in an answer do no more than contradict some allegation of the complaint, as to which the findings are complete, it is unnecessary to make specific findings thereon." (24 Cal. Jur. 947.)

III.

Under point III, Petitioner seeks to show that the debt represented by Respondent's judgment is not a liability for obtaining money by false pretenses or false representations as defined by the Bankruptcy Act and that it is a liability *ex contractu*, and therefore discharged.

Petitioner refers to, without fully quoting, the stipulation for judgment which provides:

"The defendants waive trial, findings of fact and conclusions of law and stipulate that judgment be taken and entered against them, the said defendants, by confession in accordance with the allegations of the complaint." (R. 45.)

He complains that the stipulation does not say "all of the allegations in the complaint"; that it does not say "which of the conflicting allegations shall be preferred above the others"; that "it does not say which of the obviously conflicting theories shall be adopted or discarded"; that it does not say "which of the obviously conflicting causes of action shall be adopted . . ." (Pet. Br. 79.)

Our answer to this group of complaints is this:

Petitioner was an attorney at law at the time he signed the stipulation. (He had made an assignment of contracts for attorneys fees, as security for the debt (R. 32)). He was therefore informed or should have been informed as to the nature of the instrument which he was signing.

In the first place, we find no "conflicting" allegations nor theories nor causes of action in the complaint (R. 28-44).

California practice allows the joinder of causes of action in fraud with others in contract.

> "The plaintiff may unite several causes of action in the same complaint, where they all arise out of:
>
> 1. Contracts, express or implied;
> 2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same;

3. Claims to recover specific personal property, with or without damages for the withholding thereof;
4. Claims against a trustee by virtue of a contract or by operation of law;
5. Injuries to character;
6. Injuries to person;
7. Injuries to property;
8. Claims arising out of the same transaction or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section;
9. Any and all claims for injuries arising out of a conspiracy, whether of the same or of different character, or done at the same or different times.

The causes of action so united must all belong to one only of these classes except as provided in cases of conspiracy, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person;

Provided, however, that in any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by the husband alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband.

> Provided, further, that causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately." (C. C. P., Sec. 427.)

And the joinder of such counts in fraud with others in contract does not constitute waiver of either. If it were otherwise, what could be the purpose of such joinder?

Blodgett v. Trumbull, 83, Cal. App. 566;

Kane v. Mendenhall, 5 Cal. (2d) 749;

1 *Cal. Jur.* 345;

1 *Cal. Jur.* 356.

The foregoing authorities, which are uniformly held as the law of pleading in most of the states, clearly show that as long as the several counts pleaded arise out of the same transaction, they may be pleaded without requiring an election or without waiver of any of them.

We shall later discuss Petitioner's cases on waiver of tort under another head and cite the law which supports our theory herein.

A. Petitioner contends that the Judgment which is the basis of the claim here involved, "in apportioning damages between the two co-defendants is indisputably a judgment on contract."

We venture to dispute this "indisputable" contention.

Our position is simple and easily understood.

The judgment was joint, in so far as it was against both defendants, in the sum of $5,700.00 together with interest. The only separate judgment was in the sum of $730.00 together with interest against the other defendant, Johnston (R. 47).

There was no attempt to take split or several judgments against the two defendants so far as Walters is concerned. *There is no individual or separate judgment as to him in the record.*

He was, of course, the only defendant involved in the appeals and in the Bankruptcy Courts; in those cases, therefore, Walters is the only defendant involved. But his liability is always joint with his co-defendant and the payment of the joint judgment by him would release his co-defendant.

Here the judgment against both defendants jointly *was for a definite sum,* and the separate judgment against Johnston was for an additional sum. The additional sum was not awarded against Walters.

The reason for the rule on *segregation* of damages between joint *tort feasors* is stated in the California case of *Phipps v. Superior Court,* 32 Cal. App. (2d) 377-378:

> "We agree with that part of the decision in *Bradford v. Brock,* 140 Cal. App. 47, 50, 51 (34 Pac. (2d) 1048), reading as follows: 'The jury returned a verdict as follows: "We the jury in the above entitled action, find for the plaintiffs and assess the damages at $2,500.00 against Paul M. Brock, and $2,500.00 against Schwabacher-Frey Stationery Company." Judgment thereon was entered for plaintiffs for $2,500 as against Brock and $2,500 as against the stationery company, being a several judgment on which plaintiffs could legally collect a total of $5,000. The court should have construed the verdict as being for a total sum of $2,500 against both defendants and, if otherwise satisfied with the correctness, should have entered judgment to that effect . . . The reason for the rule is obvious. If the detriment to plaintiffs caused by the operator of the car is found

by the jury to be $2,500, they should not be permitted to collect that sum from him and then go to the owner or employer whose liability arises out of his relationship to the car or its operator, and not out of an independent act, and collect a further like sum, thereby obtaining double the amount to which plaintiffs are entitled under the jury's decision.'"

Moreover, this judgment is by stipulation, which is in itself in the nature of a contract which we submit might, if it chose to do so, segregate the damages between the *tort feasors* without losing its character as a tort judgment.

Petitioner in his Brief points to the memorandum opinion of the United States District Judge on the question of apportionment of damages which Petitioner quotes in Pages 81-82 of his Brief.

He argues that no one has questioned the soundness of that opinion.

The Court that delivered the opinion (Hon. Leon R. Yankwich, R. 101-103), questioned it for he decided against it on May 3, 1943 (R. 105).

But there was no apportionment of damages so far as the joint judgment was concerned. That judgment was for the same amount against both defendants.

B and C.

Under these two heads, pages 83 and 88 of his Brief, Petitioner attempts to show that the complaint upon which the judgment was based was on contract rather than tort and that, by the form of the complaint, Respondent waived the alleged fraud and sued in contract.

We shall argue these two points together.

On Waiver or Tort.

Under California law a count in fraud may be joined with any number of counts in contract without waiver or tort thereby resulting (C. C. P. 427, *supra*).

Under the facts pleaded in this case there was no waiver of tort nor election of the remedy of suit on the contract by Mrs. Wilson.

8 *C. J. S.*, 1521;

Gehlen v. Patterson (*supra*);

Standard Sewing Machine Co. v. Mitchell, 132 App. Div. 539;

Rothchild v. Stein, 16 A. B. R., N. S. 476;

In re Menzin, 38 A. B. R. 435.

In the Petitioner's argument he cites certain cases in support of his theory on waiver of tort.

Hill v. Superior Court, 16 Cal. (2d) 527.

Here an attachment was issued on the appellent's affidavit. *An attachment cannot* issue on a claim *ex delicto*.

Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 438;

L. A. Drug Co. v. Superior Court, 8 Cal. (2d) 71;

McCall v. Superior Court, 1 Cal. (2d) 527;

California Treasure Box Co. v. Superior Court, 2 Cal. App. (2d) 202.

All of these last five cases were attachment cases.

It is the law in California that an attachment may issue only upon an action upon a contract express or implied for the direct payment of money (C. C. P., Sec. 537).

Before an attachment can issue an affidavit must be signed by the person taking out the attachment stating that the action is upon contract express or implied (C. C. P., Sec. 538). The courts have held in the aforementioned and in numerous other cases, that the obtaining of an attachment in a case which involves an election of remedies between tort and contract, is an evidence of election of remedies in favor of contract and against tort. The text of the foregoing cases cited by defendant bear upon this point, and the text of the opinions upon the facts involved do not otherwise decide anything that can clarify or assist in the present proceeding.

In other cases cited by Petitioner under this head *rescission* was the form of relief sought. The following were either cited or quoted in this connection by Petitioner.

Philpott v. Superior Court, 1 Cal. (2d) 512;

McCall v. Superior Court (*supra*);

California Treasure Box Co. v. Superior Court (*supra*).

In other cases still different conditions existed, none of which are present in the *Walters* case. For instance,

Stack v. Wellman, 96 Cal. 400.

In this case there was no fraud whatsoever alleged. The complaint was in two counts, one definitely on contract and the other on conversion. This case turned on the rule then in force (before the adoption of Section 427 of the C. C. P. permitting joinder of actions in tort and contract), that

"These two causes of action cannot be joined." (p. 401.)

Chapman v. State, 104 Cal. 690, involved a suit against the State for damages allegedly for breach of contract and negligence. When this suit was brought in 1891, there could be no suit against the State for failure in its governmental duties and on appeal the higher court held that the complaint is substantially an action for damages on the contract. No fraud or false representations were involved. The case was filed before 1907 and there could be no joinder of actions for tort and contract at that time.

Beatty v. Pac. States Sav. & Loan Co., 4 Cal. App. (2d) 695.

This case is far afield from the issues.

It merely decided that, while inconsistent facts may be pleaded in separate counts, facts that are absolutely contradictory may not be so pleaded. Nothing is accomplished by this citation.

The Wilson Case Distinguished.

There is a broad distinction between the *Wilson-Walters* case and the foregoing cases cited by Petitioner.

Mrs. Wilson did not attach.

She did not rescind.

She did not plead conversion.

She brought her action after the amendment of Sec. 427 C. C. P. permitting joinder of actions for tort and on contract.

And, in the original action this Petitioner Walters did not plead waiver of tort nor fraud as an affirmative defense. He is now estopped to set it up. He waived that defense.

Price v. De Yarmette, 27 S. W. (2d) 616;

Sleeper v. Baker, 22 N. D. 386, 134 N. W. 716.

Cases in Point on Waiver of Tort.

The cases supporting Respondent's position are legion and very much to the point.

Mrs. Wilson did not waive the tort.

She does not waive the tort by the title of her "Complaint for damages and for breach of contract," nor by the nature of the prayer of her complaint.

Luckey v. Superior Court, 209 Cal. 360;

Samuels v. Singer, 1 Cal. App. (2d) 545;

Von Schrader v. Millin, 96 Cal. App. 192.

There is the case of *Donahue v. Conley* (85 Cal. App. 15) in which plaintiff sued upon a note *without alleging fraud at all. After defendant was adjudicated a bankrupt* plaintiff secured leave to amend setting up the fraud. It appeared that defendant embezzled money belonging to plaintiff and plaintiff took his note therefor, upon which a part had been paid. Then plaintiff took a new note for the unpaid amount and the suit was upon that note. The Appellate Court held that the claim was not discharged. Interest was claimed and allowed at 4½% per annum from April 29, 1918, which is not the usual 7% legal rate and must therefore have been the rate provided in the note. The lower court refused to consider fraud on the theory that the suit was on the note. The reversal pointed out the lower court's error in this regard.

The foregoing case strongly supports Respondent's position in the present case, for surely if there was no waiver in the *Donahue* case there could scarcely be in our present case where fraud was pleaded in the original case.

There is also the case of *Crespi v. Griffin* (132 Cal. App. 526), where the plaintiff was also suing on a prom-

issory note. Again there was no allegation of fraud in the plaintiff's complaint at all. Discharge in bankruptcy was pleaded by defendant and the trial court permitted plaintiff to show the fraudulent nature of the transaction for which the note was given and to show that "fraud was included in and incidental to, that obligation." The Appellate Court affirmed the lower court's decision for plaintiff.

The fact that plaintiff claimed only the amount due upon the note in both of the foregoing cases and that that amount was the same as the measure of his damage from the tort, did not affect the situation at all; nor did the fact that interest was claimed, affect the situation.

It should be noted that in both of these cases plaintiff was asking for judgment in State courts where waiver of tort would have been proper for the court's consideration.

In the present case, however, we did have a judgment in the State court with a waiver of findings and upon stipulated facts.

Our case is infinitely stronger than the two cases just referred to, because in determining whether a claim based on fraud is dischargeable in bankruptcy as has been shown before herein, the court is not limited to the *form* of the pleading.

One of the clearest State cases on record touching the issues here is

> *Fred C. Ehnes v. Roger N. Generozzo,* 19 N. J. Misc. 393.

This case is so comprehensive as to cover most of the issues here including *"res adjudicata,"* "construction of pleadings," "waiver of tort," "estoppel," "examination of

the record," etc. We respectfully urge the Court to examine the details of this case.

Petitoner has cited the case of

Marr v. Superior Court, 30 Cal. (2d) 275,

we refer to the California Supreme Court case of *Wilson v. Walters,* which states that the court in the *Marr* case erroneously relied upon the case of *Crawford v. Burke* (195 U. S. 176) "and is therefore disapproved."

Petitioner refers to the *Crawford v. Burke* case, stating that "it has never been overruled." (Pet. Br. p. 95).

He cites certain cases which have "upheld" the *Crawford v. Burke* case. He overlooks the fact that *Tindle v. Birkett* was started in 1898, prior to the amendment of 1903.

Before 1903 a claim for fraud was not provable unless reduced to judgment. But if such claim could have been based on an open account or on contract, express or implied, it *was* provable. The claim in the *Crawford v. Burke* case was not reduced to judgment when the discharge was granted *and was, therefore, not provable as fraud.*

The entire *Crawford v. Burke* case turned on the provability of the claim in fraud.

But—since 1903 a claim for fraud need not be reduced to judgment to be provable if it is susceptible of proof or definite ascertainment.

The foregoing law shows that the Petitioner's point under consideration in our argument is no longer supported by the prevailing law of the country, particularly, the Federal Courts.

The defendant in the *Tindle* case set up his discharge in bankruptcy as a defense in the lawsuit wherein the plaintiff sought to recover damages for fraud. The claim was not provable as fraud under the law as it then existed. It was, however, provable under contract and was, therefore, dischargeable. The case is not in point here.

Petitioner quotes from *Grant Shoe Co. v. W. M. Laird Co.,* 212 U. S. 445, and in this case we note that the "provable debts" referred to in the quotation is followed by "with certain exceptions," which we submit means, among others, debts based on *fraud.*

Clarke v. Rogers, 228 U. S. 534.

Petitioner's citation omits the Court's comment "that some torts may be waived," etc.

Here again is the same distinction. There is a difference between torts involving *actual fraud* and torts which involve no fraud or which involve constructive fraud only; trover, for instance. On page 548 of the *Clarke v. Rogers* case, the Court further discusses the question raised by appellant and states plainly that the *Crawford v. Burke* case was decided on the test of provability of the debt. We have already shown that provability of the debt in the *Crawford v. Burke* case was determined by the fact that no judgment had been rendered for the alleged fraud.

Schall v. Camors, 251 U. S. 239.

We respectfully submit that the above case does not hold as indicated by Petitioner in his brief. The case does hold as follows in reference to the points stated by the Petitioner:

> "Where the tortious act constitutes at the same time a breach of contract, a different question *may be raised, with which we have no present concern.*"

The case of *Kreitlein v. Ferger,* 238 U. S. 21.

This was an action in trover where actual fraud was not involved. Therefore, the law relating to cases of actual fraud is not determined by this citation. We have already stated that where actual fraud is not involved in cases involving tort and contract combined, a discharge might bar the debt.

Standard Sewing Machine Co. v. Kattell, 132 App. Div. (N. Y.) 539.

Petitioner cites this case for some reason to support his position. It does not support it, because here the plaintiff *could have* sued upon an implied contract. The Court in this case holds exactly in harmony with Petitioner's position in the present argument, namely, that the debt is not dischargeable.

We shall now discuss the law as stated by the authors in bankruptcy, following the cases, both Federal and State.

> "A judgment, in an action on the contract and involving a waiver of any tort there might have been present, is dischargeable, not so, however, if the action in contract does not involve such an election of remedy as will bar any recovery in tort." (8 C. J. S. 1521.)

Here we cite the case of *Gehlen v. Patterson,* reported in 17 American Bankruptcy Reports, page 131. Among other things, this case decided (decided in 1928):

(1) A creditor's proof of a claim upon a judgment obtained before the debtor's bankruptcy on a promissory note does not prevent the creditor, when suing upon the judgment after bankrupty, from showing that the loan

for which the note was given was obtained by fraud, and, therefore, not dischargeable.

(2) Neither an action on a note before the debtor's bankruptcy nor action on the judgment after his discharge is an election of remedies which will bar the creditor from showing that the loan for which the note was given was procured by fraud and that the action on the judgment was really an action for fraud in obtaining the loan for which the note was given, and, therefore, not affected by the discharge.

(3) Whatever may be the cause of action sued upon, if it appears that it was from fraud in obtaining the property of the claimant, the liability set forth in the action is not dischargeable, regardless of whether it existed as a provable claim at the date of bankruptcy.

(4) Where the judgment upon which a creditor sues after bankruptcy of a debtor is upon a note given for a loan obtained by fraud of the bankrupt, the discharge will not be a bar.

In its opinion the Court discussed the issues further as follows: Regarding the proof of a claim in one form against the bankrupt's estate as a waiver of remedies in other forms, "The test is not whether the causes of action arise out of the same general subject matter, but whether one action produces a status which necessarily bars the other."

For example, *assumpsit* for the value of converted property confirms the defendant's title so as to bar trover, but an action of deceit in the sale of property confirms the sale so as to bar rescission and the right to return the property and recover its price. "It is the inconsistency of the demands that makes the election of one remedy or

right an estoppel against the assertion of the other, and not the fact that the forms of action are different."

Mrs. Wilson's position that she did not waive the tort has ample support in the Federal cases.

Where a contract action does not involve an election of remedies, but the creditor has a cumulative remedy in tort for obtaining money by false pretenses or representations, the latter liability is not barred by a discharge. (*Collier on Bankruptcy,* 14th Ed., page 1608.)

Proving by a creditor of his claim in bankruptcy does not constitute a waiver of the non-dischargeable character of the debt and a subsequent action in tort for false representations will lie. (*Collier on Bankruptcy,* 14th Ed., page 1608.)

A judgment against bankrupt obtained in an action for money had and received to recover money loaned to the bankrupt as a result of his false and fraudulent representations, as alleged in the complaint, is not dischargeable in bankruptcy. (*In re Stark,* D. C., N. Y., 50 Fed. (2d) 260.)

Although a creditor proved its claim for goods sold and delivered and received a dividend, bankrupt's discharge does not bar a subsequent action in tort for deceit based upon allegations that defendant procured the goods from plaintiff on credit by false representations as to his financial condition. (*Rothchild Bros. Hat Co. v. Stein,* 16 A. B. R., N. S. 476, 1930.)

Creditors, by proving their claims in bankruptcy by contract, do not waive their right and are not precluded

from subsequently suing for the balance in tort in the State Courts. (*In re Menzin* (U. S. Circuit Court of Appeals), 38 A. B. R. 435, 1916.)

Forsyth v. Velmeyer, 177 U. S. 177;

Ames v. Mori, 138 U. S. 306;

Strang v. Bradner, 114 U. S. 555.

We shall not try to answer Petitioner's argument on the California case of *Nathan v. Locke,* 108 Cal. App. 158, for the reason that this Respondent is *not* seeking *contribution* from Petitioner.

None of the cases cited by Petitioner, including the last case mentioned, involved judgments by stipulation or confession.

Judgment by Stipulation.

Petitioner Walters stipulated to judgment by "Confession" and "in accordance with the allegations of the complaint."

The effect of this peculiarly worded stipulation, with its waiver of findings is to:

(a) Cure any defective statement of the cause of action for false representation, there being no question as to jurisdiction, and there being substantial facts and conclusions alleged upon which to base a case.

(b) To give evidentiary value to conclusions of law that they might not have if objected to by demurrer or motion to strike.

(c) To waive all objection to the form of the action, the complaint, to any misjoinder, to any insufficiency excepting as to jurisdiction.

(d) To waive all objection to the form of the judgment.

We must have in mind that this stipulation was signed, *after* an answer had been filed *denying* the fraud. Thus the issue was raised and *settled* by the stipulated judgment.

Any objections to the sufficiency of Respondent's complaint that might have been raised before Petitioner answered were waived by his answer and stipulation for judgment; a judgment by stipulation or consent being the equivalent of a judgment after trial. (*Guaranty Liquidating Corporation v. Board of Supervisors,* 22 Cal. App. (2d) 684.)

> "Where a pleading contains an allegation which is not a nullity and largely a conclusion of law and the opposite party, without questioning its sufficiency in a timely manner takes issue thereon and proceeds to trial, the defect is cured."
>
> *Western Real Estate Trustees v. Hughes,* 172 Fed. 206.

Where there is a plea to merits and all parties go to trial accordingly, irregularities previously set up by pleas in abatement and demurrers to them are waived.

> *Bell v. Mobile,* etc., 71 U. S. 598.

> "An omission to plead a material fact is cured by the tender of an issue regarding it by the pleading of the opposite party."
>
> *New York Life Ins. Co. v. Rees,* 19 Fed. (2d) 781, p. 787.

> "When a complaint is not totally devoid of allegation upon a particular point and the objection that it is insufficient in that regard is first made on appeal, the trial having been conducted by the objecting party

upon the theory that it was sufficient, it will be upheld."

Fowler v. Enriquez, 56 Cal. App. 107, 204 Pac. 854.

"Where parties join issue during the trial of a case as though the pleadings presented the issues in question they will be held to have waived the right to object to a deficiency in the pleadings."

Sallee v. Sallee, 63 Cal. App. 54, 218 Pac. 69.

"Notwithstanding there is no direct averment that the fraudulent representations induced the plaintiff to enter into the transaction set forth, yet in the absence of a demurrer, where the same was inferentially averred, the pleading will be held good after judgment."

Nevin v. Gary, 12 Cal. App. 1, 106 Pac. 422.

If the Petitioner Walters claims that the original complaint of Respondent upon which the judgment was based did not state a cause of action for obtaining money by false representations and that therefore this judgment is void, see the following:

"Bad pleas, which are cured by verdict are those which although they would be bad on demurrer, because wrong in form, yet still contain enough in substance to put in issue all of the material facts of the declaration."

Garland v. Davis, 45 U. S. 131.

We claim that the record shows sufficient substance on the issue of fraudulent representations, which, taken with Petitioner's stipulation and with the far-reaching effects of such a stipulation which waives any defects, is ample for all purposes of this proceeding.

Moreover, if the complaint was demurrable for uncertainty, such uncertainty, likewise, was cured by the stipulated judgment.

If the complaint was demurrable because any cause of action on the ground of fraud was stated in the form of legal conclusions rather than by allegations of fact, that defect was likewise cured by the stipulated judgment.

When necessary facts are shown to exist although inaccurately or ambiguously stated, or appearing by necessary implication only, the complaint is sufficient as against a general demurrer or objection on appeal.

21 *Cal. Jur.* 271, with citations.

A judgment is no less conclusive because the matter settled thereby is improperly pleaded if no objection was made at the time.

34 *Corp. Jur.* 776.

In the case of consent judgments such defects are waived.

Again, we ask that serious consideration be given the vital fact that here we have a judgment upon *"the allegations of the complaint."*

Being a judgment on stipulated facts and by consent *it stands apart* from much of the law cited by the Petitioner Walters. However, so far as the effect of a judgment by consent on defects in the pleadings is concerned, there is ample law.

> "AS WAIVER OF DEFECTS OR IRREGULARITIES. A judgment by consent or agreement operates as a waiver of all defects or irregularities in the process, pleadings, or other proceedings previous to the rendition of the judgment, except such as involve the jurisdiction of the court."
>
> 34 *Corp. Jur.* 134.

"Tex. Civ. App. Generally, a party cannot complain of a judgment rendered by consent or on agreement and such judgment waives all errors committed before its rendition except errors that involve jurisdiction of the court, and it is not a valid objection that cause of action was so defectively stated as to require reversal had the judgment been rendered on a contest."

Logan v. Mauk, 126 S. W. (2d) 513. error dismissed.

See *Swift & Co. v. United States,* 276 U. S. 311. This case involved a consent decree enjoining the defendants against certain acts. The United States had sued for an injunction and defendants consented to the decree without proof or finding of facts. Later defendants moved to vacate the consent decree on the ground that there was no case or controversy to afford jurisdiction. Denied.

"Error * * * being of a kind reviewable on appeal * * * is waived by consent to the decree."

"Provisions of the consent decree cannot be assailed (5) * * * upon the ground that defendants are restrained in the future from lawful use of business *not connected* by any findings of facts with the conspiracy charged; since consent to entry of the decree without such findings left power in the court to construe the pleadings and therein to find circumstances of danger justifying said prohibitions" (page 328).

Judgment by consent excuses error and operates to end all controversy between the parties. All errors are waived by a consent decree. (*Pacific RR Co. v. Ketchum,* 101 U. S. 289.)

Where a case is submitted on an agreed statement of facts, for such judgment as the law requires, all questions

of the sufficiency of the pleadings are waived. (14 *Cal. Jur.* 878.)

Even if the cause of action for fraud is defectively pleaded, such defect is cured by the judgment. (*Stewart v. Burbridge,* 10 Cal. App. 623.)

By stipulation to entry of judgment for plaintiff defendant waives defects in the complaint even as to matters of substance. (21 *Cal. Jur.* 273.)

WAIVER OF FINDINGS.

By his stipulation in the original case the Petitioner waived findings of fact and conclusions of law. The effect of this waiver is manifest. Walters answered the original complaint denying the fraud—before he signed the stipulation. He thus pleaded to the merits.

> "When findings are waived, it is presumed that every fact essential to the support of the judgment was proved and found by the court." (24 *Cal. Jur.* 956, with numerous citations.)

What could have been gained had the Bankruptcy Court chosen to exercise jurisdiction in the Walters bankruptcy matter?

If the Respondent's position is sound in other respects, the Bankruptcy Court could have arrived at but one conclusion as to the dischargeability of the debt—namely, that it is non-dischargeable. Had it followed that course and so ordered, the results for all practical purposes would be the same as they now are.

Dated August 7th, 1944.

Respectfully submitted,

CHARLES E. BEARDSLEY and
W. CLOYD SNYDER,
Counsel for Respondent.